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81-2362

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

B. F. DIAMOND CONSTRUCTION COMPANY, INC.
and
AETNA CASUALTY & SURETY COMPANY,
Petitioners,

-v.-

HOWARD LEMELLE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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Questions Presented

1. Is a construction worker employed in building a bridge over navigable water, who performed no functions associated with longshore, shipbuilding or harbor work, involved in "maritime employment" within the meaning of the Longshoremen and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 902(3)?

2. Are the questions of fact determined by the Administrative Law Judge (ALJ) and the Benefits Review Board subject to independent review by the Courts of Appeals without a ruling of no substantial evidence to support the determination of the Administrative Courts?

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B. F. DIAMOND CONSTRUCTION COMPANY, INC.
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HOWARD LEMELLE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 25, 1982.

Opinion Below

The opinion of the Court of Appeals for the Fourth Circuit in the captioned matter is reported at 674 F.2d 296, (1982), 14 BRBS 609, and is reprinted as Appendix A hereto, *infra*, p. A-1.

The opinion of the Benefits Review Board (United States Department of Labor) is reported at 13 BRBS 542 and is reprinted as Appendix B hereto, *infra*, p. B-1. The opinion of the Administrative Law Judge is reprinted as Appendix C hereto, *infra*, p. C-1.

Jurisdiction

The opinion of the Court of Appeals for the Fourth Circuit was entered on March 25, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statutory Provisions Involved

United States Code, Title 28:

> § 920(3): The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> §921(c): Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United

States Code [28 USCS § 2112]. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

Statement of the Case

Claimant LeMelle, employed by B. F. Diamond Construction Co., Inc., was working as a concrete finisher on the construction of the new James River Bridge at Newport News, Virginia. LeMelle's sole duties at the time of his injury on November 23, 1977 involved pouring and vibrating concrete on a highway bridge pier approximately one mile from shore. LeMelle was working inside a form that was used to shape and hold concrete for a stem of the pier. The stem was attached to a concrete footer, and the footer to a piling that had been driven into the ground under the river.

LeMelle contended that he was an employee engaged in maritime activity, not by his occupation, but by the sheer fact that the bridge was being built in aid of navigation. The ALJ found that LeMelle was not engaged in maritime employment within the meaning of the LHWCA. He adopted the ALJ's inferences drawn from similar facts in *Broome* v. *B. F. Diamond*

Construction Co., Inc., 5 BRBS 59 (ALJ) (1976), a matter involving another of petitioner's bridge workers. In *Broome*, the ALJ found that the bridgeworker was not a worker in either the longshoring or shipbuilding industries. It also found that the bridge was not an aid to maritime traffic. The Benefits Review Board affirmed the ALJ's decision, specifically finding that the bridge was not an aid to navigation and that LeMelle's work, not having "a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters," was not maritime employment within the meaning of § 902(3). (B-4, 11).

The Court of Appeals reversed. The single connection that the court below found that the claimant had with maritime activity was the "fact," arrived at through its *own* determination, that the bridge on which claimant was working was in aid of navigation (merely because the new bridge provided more clearance than the bridge it was replacing) (A-4-5). It reversed the findings of the ALJ and the Benefits Review Board that the bridge was not in aid of navigation. This single connection was all that the court below considered in concluding that LeMelle had a "realistically significant relationship to maritime activities." In reaching its determination, the court below did not make any ruling that the findings of the ALJ or Benefits Review Board were not supported by substantial evidence.

Reasons for Granting the Writ

1. By discarding the Caputo/Ford two-pronged occupational test, Fourth Circuit, contrary to Congressional intent, categorically extends LHWCA coverage to virtually all bridge construction workers

The decision below establishes a new dimension to coverage under the Longshoremen and Harbor Workers Compensation Act (LHWCA) by examining exclusively the nature of the facility on which claimant was working, rather than the nature of claimant's occupation. No finding was made as to whether claimant was *performing* any activities that were related to longshoring, harbor work or shipbuilding.

The Fourth Circuit has set an anomalous and dangerous precedent. No other Court has held a bridge worker not engaged in longshoring, harbor working or shipbuilding activities to be covered. Under the Fourth Circuit's rationale, all workers even remotely involved in an "aid to navigation," and virtually all bridge workers, would be covered, including, *inter alios*, delivery truck drivers and safety inspectors, whose work, like LeMelle's, could not meaningfully be called "maritime employment."

Section 902(3) of the Act defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such person does not include a master or member of a crew of any vessel. . . ." The Fourth Circuit has disregarded the parameters of "maritime employment" as established by the Supreme Court in its review of this provision of the Act and its legislative history.

In *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 U.S. 249 (1977), the Court concluded that the Act was amended in 1972 to provide coverage to workers in *occupations* which Congress intended to reach, who might otherwise, because of technological improvements, be covered for only part of their activity. In *P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69, 79 (1979), the Court again stressed the *nature of the employment*, and noted that Congress did "not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel" (*quoting* H.R. Rep. No. 92-1441).

In *Ford*, the Court concluded that the Act focused on the nature, not location, of employment. The Act, it observed, "does not extend coverage to all workers in the situs area. . . ." As an example, the Court said, "neither the driver of the truck carrying cotton . . . nor the locomotive engineer . . . was engaged in maritime employment *even though he was working on the maritime situs*." 444 U.S. at 83 (emphasis supplied)

The Fourth Circuit has significantly and unjustifiably departed from the *Caputo* and *Ford* rule. Discarding the "occupation" test and unmindful of the purposes of the LHWCA, the

Court of Appeals below held that a worker "working over navigable waters on a bridge designed in part as an aid to navigation is engaged in maritime employment." (A-9) This shift in focus from the "nature of the employment[1] to the situs' relationship to navigation thwarts the purposes of the 1972 Amendments as found by this Court. Since most projects within any maritime situs can be called "aids to navigation," the lower court decision, if allowed to stand, will mark the effective return to the pre-1972 rule of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). Extending LHWCA coverage to bridge workers covered by State compensation would not remedy the mischief which Congress sought to reach or further the purposes of the Act, and so violates a basic precept of statutory interpretation. *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1 (1904); *Heydon's Case*, 76 Eng. Rep. 637 (1584); *see also S. Rep.* No. 973 (69th Cong.), *quoted in Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 121 (1962) (ftn. 10), ("the purpose of the bill is to provide for a class of employees commonly known as 'longshoremen' ").

2. *The test invoked by the court below conflicts with the decisions of other Courts of Appeals*

The Fourth Circuit's decision is in direct conflict with other Courts of Appeals decisions and adds to the general confusion surrounding the issue at bar.

The First Circuit, in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1976), *cert. denied*, 433 U.S. 908 (1977), looks at "the nature of [the workers'] regularly assigned duties as a whole." 539 F.2d at 275. That test is in line with *Caputo/Ford*. The Second Circuit demands that work have a "realistically significant relationship to maritime activities involving navigation and commerce on navigable waters" and prohibits any test based upon locus alone. *Fusco* v. *Perini North River Assoc.*, 622 F.2d 1111 (1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 959 (1981); *accord, Churchill* v. *Perini North River Associates*, 652 F.2d 255 1980, *cert. granted*, ___ U.S. ___, 102 S.Ct. 1425 (1982). Although the Fourth Circuit evidently applied the

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[1] The hearing before the ALJ established that a respondent was not involved in any longshore or harbor work within the meaning of § 2(3). (C-4).

Fusco test, it omitted the Second Circuit's incorporation of the *Caputo* and *Ford* holdings—the reference in the definition to longshoremen and harbor workers—as well as *Fusco*'s focus on the occupation of the employee rather than the locus of the project.

The Third Circuit applies yet another test and limits the scope of maritime employment to work which is "an integral part of . . . ship construction activities," *Dravo Corporation* v. *Maxin*, 545 F.2d 374, 380 (1978), *cert. denied*, 433 U.S. 908 (1977), or a "necessary ingredient" therein, *Dravo Corp.* v. *Banks*, 567 F.2d 593, 596 (1977), and excludes work not intimately connected to longshore or harbor activities. The instant respondent would clearly fail this test.

The Fifth Circuit similarly defines maritime employment as employment "directly involved" with "the work of loading, unloading, repairing, building," *Hullinghurst Industries* v. *Carroll*, 650 F.2d 750 (1980), *cert. denied* — U.S. —, 102 S.Ct. 1037 (1982), applying this test to the maritime nature of the employment as a whole or the claimant's activity at the moment of injury. *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir., 1978), *cert. denied* 441 U.S. 909 (1978). In *Gilliam* v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., 1981) a bridge construction worker was allowed recovery only because he was "engaged in longshoring activities at the time he was injured. 659 F.2d at 58. In *Browning* v. *B. F. Diamond Const. Co.*, — F.2d — (11th Cir., 1982) the Eleventh Circuit similarly held a bridge worker covered, but only after it found that the claimant was "involved in longshoring activities" at the time of his injury. In the instant case, the record makes clear that LeMelle had never been involved in such activities. Respondent would have been denied compensation in the Fifth and Eleventh Circuits.

The Ninth Circuit in *Weyerhauser* v. *Gilmore*, 528 F.2d 957, 960 (1976), *cert. denied* 429 U.S. 868 (1976), held that for an employee to be eligible "his *own* work, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable

waters.' " 528 F.2d at 961 (emphasis supplied) There the court cited from the Act's legislative history in which the Senate Committee on Labor and Public Welfare said:

> "[T]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Id. at 960. The Ninth Circuit, too, would have barred LeMelle from recovery.

These conflicts, in themselves, justify the grant of certiorari to reverse the judgment below.

3. *The court below exceeded Congress' delegation of adjudicatory authority by failing to apply the substantial evidence test to findings of fact made by the administrative courts*

Under the terms of the Act, 33 U.S.C. sec. 921(b)(3), findings of fact by the ALJ are conclusive if supported by substantial evidence, as is the ALJ's selection of reasonable conflicting inferences from those facts. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *see also Hullinghorst Industries* v. *Carroll*, 650 F.2d 750.

The Benefits Review Board made a finding of fact[2] that the James River Bridge was not an aid to navigation, (B-7-8), concluded that respondent was not engaged in maritime employment under the test in *Sedmak* v. *Perini North River Associates*, 9 BRBS 378 (1978), *aff'd sub nom.*, *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2d Cir., 1980), and affirmed the decision of the ALJ (had the Board found that the bridge was an aid, it presumably would have decided differently. *See* B-1 *et seq.* (Kalaris, J., concurring Miller, J. dissenting)).

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[2] The Benefits Review Board is empowered to make its own finding of fact in limited circumstances, so long as they do not contradict the findings of the ALJ. *Prolerized New England Company* v. *Benefit Review Board*, 637 F.2d 30 (1st Cir. 1980).

In the case at bar, the Fourth Circuit, like the Board, applying a single-dimensioned test, made its *own* finding that the bridge was an aid to navigation[3] and that respondent therefore met the *Sedmak* test. The Court of Appeals, however, did *not* hold that there was no substantial evidence for the ALJ's decision. Therefore, it was not empowered to make such a finding and to reverse on that basis.

Section 21(b)(3) of the LHWCA mandates that findings of fact of the ALJ shall be conclusive in review by the Board "if supported by substantial evidence." Section 21(c) subjects appellate courts to the same test. *See* H.R. Rep. No. 92-1441 (1972 amendments authorize "a judicial review of board decisions in the Courts of Appeals under the same 'substantial evidence' test"), *reprinted in* [1972] U.S. Code Cong. & Admin. News, 4698, 4709.

The Fourth Circuit did not apply the substantial evidence test, but merely did "not agree with [the Board's] rationale." (A-7). In so acting, the Fourth Circuit exceeded the adjudicatory authority extended to it by Congress. *See Crowell* v. *Benson*, 285 U.S. 22, 49-50 (1931).

(b) The ALJ and the Board both found that respondent was not an employee engaged in maritime employment within the meaning of the statute. The Court below refused to accept this determination. The finding should be considered a finding of fact and subject to the substantial evidence test under *South Chicago Co.* v. *Bassett*, 309 U.S. 251 (1939). In that decision, the Court held that whether a worker was a "master or member of a crew of any vessel" (and, therefore, excluded from coverage within the meaning of § 3(a)(1) of the LHWCA,) was a question of fact. The Supreme Court ruled that the lower court's finding, "if there was evidence to support it, was conclusive." The duty of the reviewing Court, Chief Justice Hughes noted, was simply to ascertain whether it was so supported. The Court wrote that "[t]he word 'crew' does not have any absolutely unvarying legal

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[3] To demonstrate the absurdity of this kind of single-dimensioned test, the Court below would apparently have ruled the other way had the new bridge been even one inch lower than the old bridge.

significance." 309 U.S. at 258-59. Similarly, the term "employee engaged in maritime employment" demands factual solution on a case-by-case basis.

The Appellate court cannot substitute its own finding even if it does not agree with the fact-finder's estimate. Thus, in *SEC* v. *Chenery*, 318 U.S. 80, 94 (1943), this Court held:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so."

Accord, Ramos v. *Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981).

When the question is "one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially," this Court has said, "the reviewing court's function is limited." *NLRB* v. *Hearst Publications*, 322 U.S. 111, 126 (1943); *see also Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977) (whether worker is "agricultural laborer" within the meaning of the NLRA is queston of fact and appropriate weight must be given the NLRB's determination).

(c) By abandoning the substantial evidence test, the Fourth Circuit has created a conflict in circuits on this fundamental principal governing appellate review of administrative findings of fact. The decision below conflicts with the ruling of other circuits which have adhered to this Congressionally-mandated principle in reviewing LHWCA administrative decisions. *Prolerized New England Company* v. *Benefit Review Board*, 637 F.2d 30 (1st Cir. 1980); *Garvey Grain Co.* v. *Cuellar*, 12 BRBS 821 (7th Cir. 1981); *Nelson Co.* v. *United States*, 639 F.2d 469 (9th Cir. 1980).

(d) The question of maritime employment is not jurisdictional, and is, therefore, governed by the standard established in *Crowell* v. *Benson*, i.e., subject to the substantial evidence test

and not subject to *de novo* review. Thus, in *Ramos* v. *Universal Dredging*, 653 F.2d 1353, *rev'g* 10 BRBS 368 (1979), the Court of Appeals ruled that "an injury may have a sufficient connection with traditional maritime activity to be well within the reach of admiralty jurisdiction, but not an injury covered by [§ 902(3)]" *Id.* at 1358-59 (citing with approval *Weyerhauser* v. *Gilmore*, 528 F.2d 951 (case of worker in sawmill log pond within maritime jurisdiction, but not within coverage of Act)). In the instant case, the question of coverage was improperly referred to by the Board, and treated by the Fourth Circuit, as jurisdictional. (B-6, n.2); *See also Crowell*, 285 U.S. at 54-55 (jurisdictional requirements for LHWCA purposes are that "the injury occur upon the navigable waters of the U.S. and that the relation of master and servant exist). Even if the issue is "jurisdictional," the invocation of special standards of review for "jurisdictional questions" has fallen into increasing disfavor. *See O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. at 507-08; *Morrison-Knudsen Co.* v. *O'Leary*, 288 F.2d 542 (9th Cir. 1961) (holding question of § 2(3) maritime employment subject to substantial evidence test, citing *South Chicago Co.*).

4. The decision below raises significant and recurring problems concerning the reach of the LHWCA, the meaning of "maritime employment", and the proper scope of judicial review

Recent decisions of the various Courts of Appeals present widely divergent interpretations of maritime employment. The decision below, however, if followed, however, poses the greatest threat to the rulings of the Supreme Court and to implementation of legislative intent, as it effectively abrogates the status requirement established by Congress in 1972. First, the decision below completely avoids any consideration of the occupation of the employee and implements a one-pronged examination of the work-site's effect on navigation. Second, it discards at the same time any analysis of whether the claimant is performing traditional longshoring, shipbuilding, or harborworking activities. Finally, it does away with the Congressionally-mandated method of review that makes the findings of the administrative court conclusive if supported by substantial evidence.

The Benefits Review Board was created to promote judicial efficiency by administrative determination of questions of fact. The refusal of the courts to see the issue of maritime employment as one of fact thwarts the legislative purpose in establishing the Board, *see Crowell*, 285 U.S. at 56-57, and results in their unconstitutionally exceeding the power granted to them by Congress through the LHWCA.

Because of the industry-wide implications of the holding below, the repercussions are of national and pressing significance. In its most recent investigation, the United States Department of Commerce, Bureau of the Census, found that gross business receipts in the Bridge, Tunnel and Elevated Highway Construction Contractors industry amount to $2.3 billion, with net construction receipts of about $1.8 billion. 72% of all construction receipts are for bridges and elevated highways. The Comptroller General, in his Report to the Senate, warned that "the United States has more than 500,000 bridges and slightly more than 200,000—or almost 4 out of every 10 bridges—are deficient" (GAO Report B-201433, April 11, 1981), meaning that the future impact of the decision below will be material.

Clearly, extending LHWCA coverage to workers in a separate industry not contemplated by Congress for coverage will have severe effects on the national economy, especially since recovery allowed from employers by the LHWCA is significantly higher than that allowed by state compensation laws, under which the bridge construction industry has traditionally operated.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,
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APPENDIX A

Petition for Review of a Final Order of the Benefits Review Board before Butzner, Russell and Sprouse, Circuit Judges.....A-1

APPENDIX B

Decision and Order of Julius Miller, Administrative Appeals Judge ...B-1

APPENDIX C

Decision and Order of Peter MCC. Giesey, Administrative Law Judge C-1

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1559

Howard LeMelle,

Petitioner,

-v-

B. F. Diamond Construction Company and Aetna Casualty & Surety Company,

and

Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

On Petition for Review of a Final Order of the Benefits Review Board.

Argued: December 11, 1981

Decided: March 25, 1982

Before BUTZNER, RUSSELL and SPROUSE,

Circuit Judges.

John H. Klein, Mark C. Walters (Breit, Rutter & Montagna on brief) for Appellant; Ralph E. Lawrence (White, Johnson & Lawrence on brief) for Appellees.

SPROUSE, Circuit Judge:

Howard E. LeMelle appeals from the decision of the Benefits Review Board (Board) of the Department of Labor that he was not entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq. (LHWCA). At issue is whether a construction worker employed in building a bridge over navigable water, designed to benefit both highway traffic and river navigation, is engaged in maritime employment within the meaning of the LHWCA. We hold that he is and reverse

the determination of the Board.

LeMelle was employed by B. F. Diamond Construction Co. as a concrete finisher on the James River Bridge project at Newport News, Virginia. The purpose of the project was to demolish and replace the old James River Bridge. Both the old and new bridges contained a stationary section and a "lift" or draw section that could be raised to allow water traffic to pass through.

LeMelle was working on a fixed section of the bridge approximately one mile from shore and eight to ten feet above the water. He was pouring and vibrating concrete inside a form on the piling closest to the draw section of the bridge. He was transported to work by boat and was carried ashore by tugboat after his injury before he could be transported to a hospital. During his work, he had been required to wear a life

jacket and was continually over the water.

The James River, at the site of the bridge, is indisputably navigable. The United States Coast Guard was consulted in the planning of the bridge project and a Coast Guard official concluded:

> Navigation of the James River through the bridge site includes ocean going ships, tugs with tows, and a wide range of pleasure craft from small power boats to large cabin cruisers and sailboats.

Both the Coast Guard and the Virginia Department of Highways were required to comment officially on various aspects of the project. The Coast Guard indicated that the improved bridge would be an aid to navigation:

> The proposed bridge provides a 100 feet more horizontal clearance than the existing bridge. The additional horizontal clearance allows more space for use by vessels passing each other beneath the bridge and reduces the chances

> of a vessel collision with the bridge. The proposed bridge provides 10 feet more vertical clearance than the existing bridge which is expected to eliminate most draw openings except for ocean going ships.

The Department of Highways' statements were of the same tenor--that the new lift span was designed to be, among other things, an aid to navigation.

The LHWCA, as it was amended in 1972, requires an injured worker, in order to be eligible for benefits, to qualify under both a situs test and a status test. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); I.T.O. Corporation of Baltimore v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976), modified en banc, 542 F.2d 903 (4th Cir. 1976). That is, the injury must occur upon the navigable waters of the United States as defined by the Act and the claimant must have the status of an employee as defined in the

Act. The parties here agree that the situs requirement for LeMelle's claim is satisfied. The only contested issue is his status as a covered employee. Section 2(3) of the LHWCA as amended in 1972 provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. §902(3).

The respondents Diamond and Aetna urge, and the majority of the Board found, that LeMelle was not engaged in maritime employment, and therefore was not an employee covered by the Act. The Board held that "a claimant's employment must have a realistically significant

relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section Section 2(3)." The Board's opinion, while admitting that the new bridge would be an aid to navigation, said:

> However, the James River Bridge, like all bridges, is a means of land transportation, not maritime commerce. As claimant points out, the bridge was being constructed in a manner to minimize its actual obstruction of maritime traffic. Nevertheless, the very presence of a bridge obstructs navigation, serves no maritime purpose and in no way benefits navigation and commerce.

We do not agree with that rationale and hold that the work performed by LeMelle was maritime employment as defined in section 2(3). It is not necessary to relate again the tortured history of employee coverage under the LHWCA, except to note that bridge

construction and demolition workers employed over navigable water were covered prior to the 1972 amendments. Davis v. Department of Labor, 317 U.S. 249 (1942); Hardaway Contracting Co. v. O'Keefe, 414 F.2d 657 (5th Cir. 1968); Peter v. Arrien, 325 F.Supp. 1361 (E.D. Pa. 1971), aff'd, 463 F.2d 252 (3d Cir. 1972).

This court said in Brown & Root, Inc. v. Jagner, 607 F.2d 1087, 1090 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), "we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments."[1]

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[1] We did not indicate in Brown & Root, Inc., that Congress intended to include in the section 2(3) definition of maritime workers all workers held by pre-1972 judicial decisions to have been covered by the LHWCA; nor is it now necessary to decide that issue.

We hold, therefore, that the claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment, and is therefore an employee within the meaning of the Act. Although bridge demolition and construction is not classically maritime work under the "ancient traditions of the sea," it has long been merged with such work by the exigencies of modern coastal land and sea traffic. Essential to improving navigation and possessing many of the same hazards and working conditions as more traditional work on navigable waters, such employment carries with it the fundamental elements of what historically has been regarded as maritime employment.

REVERSED.

BRB No. 79-640

DECISION and ORDER

HOWARD LeMELLE

Claimant-Petitioner

v.

B. F. DIAMOND CONSTRUCTION COMPANY

and

AETNA CASUALTY & SURETY COMPANY

Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

Appeal from the Decision and Order of Peter McC. Giesey, Administrative Law Judge, United States Department of Labor.

John H. Klein (Breit, Rutter & Montagna), Norfolk, Virginia, for the claimant.

Ralph E. Lawrence, Virginia Beach, Virginia, for the employer/carrier.

Mark C. Walters (T. Timothy Ryan, Jr., Solicitor of Labor, Laurie M. Streeter,

Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by the claimant from the Decision and Order (79-LHCA-84) of Administrative Law Judge Peter McC. Giesey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter referred to as the Act).

In his Decision and Order, the administrative law judge held that claimant was not a maritime employee within the meaning of Section 2(3) of the

Act, 33 U.S.C. §902(3). 1/

Claimant appeals, arguing that his duties constituted maritime employment under Section 2(3) of the Act. Upon its review of the case, the Board is required to affirm the decision of the administrative law judge if his findings are supported by substantial evidence in the record considered as a whole, are not irrational and are in accordance with law. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith Associates, 359 U.S. 380 (1965).

Claimant was employed as a concrete finisher on the James River Bridge Project. He was injured in November 1977, when 200 to 300 pounds of mixed concrete fell on him. Claimant was working on a

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1/ Section 2(3) provides, "The term 'employee' means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . "

piling some eight to 10 feet above the water. The piling was approximately one mile from shore and could be reached only by boat.

Claimant contends that his duties constituted maritime employment as defined by the Board in Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896, et al. (1978), aff'd sub nom. Fusco v. Perini North River Assoc., 622 F. 2d 1111, 12 BRBS 328 (2d Cir. 1980) cert. denied, 101 S. Ct. 953. In Sedmak, we concluded that " . . . a claimant's employment must have a realistically significantly relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." 9 BRBS at 386. Claimant contends that his work had a significant relationship to maritime activities since he was working on a

project which would benefit maritime commerce and improve navigation upon the James River.

The James River Bridge Project involved tearing down an old two-lane bridge and building a new four-lane replacement bridge. Claimant was engaged in the construction of the new bridge. Claimant points out that documents admitted into evidence, including an environmental statement and other documents which relate to the issuance of permits, indicate that the project was planned to improve auto travel across the river and to improve the navigation of the James River. See Cl. Ex. 1. The Coast Guard District Commander responsible for the issuance of construction permits stated in his findings that the James River is used by vessels ranging from ocean-going ships to small pleasure craft. He found that the new bridge would have

no adverse effects upon any vessels known to the Coast Guard nor would the bridge limit the types of vessels now using or expected to use the James River in the future. Cl. Ex. 1, Coast Guard Findings at 2.

According to claimant, the above evidence indicates that the new bridge will provide a significant aid to navigation, and that, therefore, claimant's work constructing the bridge constituted maritime employment. 2/ However, in Nold v. Guy F. Atkinson Co., 9 BRBS 620, BRB

2/ Our dissenting colleague argues that the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), should be applied to find coverage in this case. The dissent takes the position that the presumption is applicable to factual issues underlying the threshold issue of coverage under Section 2(3). Assuming arguendo, that the presumption may be so applied, there are no factual issues at dispute in this case. Claimant was engaged in bridge construction. The issue is thus one of legal interpretation, i.e., whether bridge builders are maritime employees within the meaning of Section 2(3).

Nos. 78-361/a (1979), the Board concluded that a claimant engaged in bridge construction was not within the Sedmak definition of maritime employment, notwithstanding the fact that he was "working on a portion of the bridge that was designed to avoid obstruction of navigation." Nold, 9 BRBS at 624. See also Gilliam v. Wiley & Jackson Co., 12 BRBS 556, BRB Nos. 79-388/a (1980), holding that a worker engaged in building bridges across the Amelia River was not a maritime employee.

Claimant seeks to distinguish Nold on the basis that the bridge involved in the instant case will actually aid and improve nagivation. However, the James River Birdge, like all bridges, is a means of land transportation, not maritime commerce. As claimant points out, the bridge was being constructed in a manner to minimize its actual

obstruction of maritime traffic. Nevertheless, the very presence of a bridge obstructs navigation, serves no maritime purpose and in no way benefits navigation and commerce. 3/ Thus, the construction work performed by claimant was not analogous to construction work serving a maritime purpose which is covered by Section 2(3). See Martin v. Kaiser Steel Corp., 9 BRBS 903, BRB No. 78-449 (1979); Silva v. Massman Construction Co., 9 BRBS 932, BRB No. 78-341 (1979). 4/ Rather,

3/ It is irrelevant that claimant's work did not involve the actual draw span of the bridge. Regardless of the part of the bridge he was working on, claimant was not covered by Section 2(3).

4/ Also without merit is claimant's argument that his work was similar to that of claimants held to be covered employees who constructed locks and piers. See Hunter v. Duncanson-Harrelson Co., 8 BRBS 83, BRB No. 77-433 (1978); Hed v. Duncanson-Harrelson Co., 7 BRBS 821, BRB No. 77-260 (1978); aff'd, F.2d , 13 BRBS 308, Nos. 78-1873, 79-7572 (9th Cir. May 8, 1981); Wright v. Taylor-Johnson Construction Co., 9 BRBS 372, BRB No. 77-591 (1978).

claimant's duties were more similar to those of claimant in Rhodes v. Healy Tibbits Construction Co., 9 BRBS 605, BRB No. 78-423 (1979), wherein we held that claimant's construction work on a pier which was to be used only for recreational fishing to carry a sewer pipe to the ocean was not an activity covered by Section 2(3) because the pier was not for any maritime use. Therefore, claimant's work did not constitute maritime employment as defined in Sedmak.

Claimant argues that even if he is not covered under the Sedmak definition of maritime employment, he was engaged in employment covered by pre-amendment law. In support of this contention, claimant cites several pre-amendment cases holding that construction workers similar to claimant were engaged in covered employ-

ment. 5/ However, we do not find pre-amendment law controlling in determining coverage under the Act. See Sedmak, v. Perini North River Assoc., supra, at 387. Therefore, we reject claimant's contention that pre-amendment case law is dispositive of coverage in this case.

Similarly, we reject claimant's contention that he is covered under the post-amendment Act because he would have been covered pre-amendment by cirtue of his injury having occurred on navigable waters. See Sedmak, supra. 6/

5/ Claimant relies heavily on Peter v. Arrien, 325 F. Supp. 1371 (E.D. Pa. 1971), aff'd per curiam, 463 F.2d 252 (3d Cir.1972), a pre-amendment case involving an employee engaged in the demolition of a bridge. This case is not applicable where claimant was engaged in the construction of a bridge. See Nold, supra.

6/ Claimant relies on the decision of the United States Court of Appeals for the Second Circuit which reversed our decision in Sedmak, sub nom. Fusco v. Perini North River Associates, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979). Subsequently, Fusco was vacated and remanded by the Supreme Court. 100 S.Ct. 697 (1980).

Therefore, we hold that claimant was not a maritime employee within the meaning of Section 2(3) of the Act. Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

SAMUEL J. SMITH, Chief
Administrative Appeals
Judge

(con'd)
Upon reconsideration, the Second Circuit affirmed our decision in Sedmak, rejecting a geographic interpreation of Section 2(3). Fusco v. Perini North River Associates, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), cert. denied, 101 S.Ct. 953 (1981).

Claimant also contends that the U.S. Court of Appeals for the Fourth Circuit has held that a claimant who would have been covered pre-amendment is automatically covered post-amendment by virtue of his injury having occurred on navigable water. However, in Brown and Root, Inc. v. Joyner, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), cert. denied, 100 S.Ct. 2960 (1980), the Fourth Circuit specifically declined to rule on this issue.

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' determination that claimant was not engaged in employment covered by Section 2(3) of the Act. In this case, my colleagues have applied a restrictive interpretation of Section 2(3) which denies coverage to a claimant clearly intended to be within the scope of the Act. In so doing, the majority once again ignores the statutory presumption contained in Section 20(a) of the Act as well as the long standing policy that the Act is to be liberally construed to carry out its beneficent purposes.

I.

Section 20(a) of the Act provides claimant with a presumption, in the absence of substantial evidence to the contrary, "that the claim is within the

provisions of the Act." 33 U.S.C. §920(a). As I pointed out in my dissenting opinion in Sedmak, 9 BRBS at 388, this presumption is applicable in determining whether claimant falls within the coverage provisions of the Act, including Section 2(3). However, in Sedmak, my colleagues held that the presumption contained in Section 20(a) of the Act was inapplicable to "the threshold issue of coverage such as status under Section 2(3)." 9 BRBS at 383. On the basis of this holding, my colleagues now ignore the Section 20(a) presumption in all cases involving coverage under the Act. However, as I shall make clear below, the majority's interpretation of Section 20(a) in Sedmak is not supported by the relevant case law.

In Sedmak, the Board majority relied on Pittston Stevedoring Corp. v.

Dellaventura, 4 BRBS 156, 544 F.2d 35 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo, 6 BRBS 150, 432 U.S. 249 (1977), and Stockman v. John T. Clark of Boston, 4 BRBS 304, 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977), to support its holding that Section 20(a) is not applicable to the coverage provisions of the Act. However, neither case supports the proposition that the Section 20(a) presumption is inapplicable to the coverage provisions of the Act. The proper interpretation of these cases is that, while Section 20(a) applies to coverage, it does not apply to questions of statutory interpretation of the jurisdictional portions of the Act. Thus, the presumption does not operate to indicate the proper test in interpreting and determining the scope of Section 2(3), but does provide that a claimant is

presumed to meet any test "in the absence of substantial evidence to the contrary." 33 U.S.C. §920. This interpretation is illustrated by the language of the Second Circuit in Dellaventura:

> [Claimants] contend that if the meaning of the new coverage provision, 33 U.S.C. §903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See Crowell v. Benson, 285 U.S. 22, 64-65 (1932).
>
> Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. §902(2), could be widely stretched, the Court has done little more than mention the presumption, [citations omitted]. . . . The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption [citations omitted]. The cases in this court, Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645-46 (2 Cir.) cert. denied, 382 U.S. 835

> (1965), and Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See Davis v. Department of Labor, 317 U.S. 249 (1942).

4 BRBS at 173-74, 544 F.2d at 48. [Emphasis added.]

In relying on Dellaventura, my colleagues have apparently ignored the latter portion of the court's statement, which is of primary importance in delineating the circumstances when the presumption does and does not apply. The Second Circuit stated that the

presumption was inapplicable to issues of legal interpretation involving where the line of coverage was to be drawn. The Court did not deny that, once the line is established, the presumption is to be applied to factual questions concerning whether claimant is within or outside of that coverage. Thus, the Court's view in Dellaventura is consistent with its earlier view in McMullen, which the Second Circuit relied on in Dellaventura.[1/]

1/ In Sedmak, my colleagues relied on Dellaventura, but stated that reliance on McMullen was misplaced. This statement was based on the fact that Dellaventura was a later case and entitled to more weight. The majority also noted in Sedmak that the McMullen court held that a prima facie showing of jurisdiction had been made and therefore did not rely totally on the Section 20(a) presumption. Thus, in Sedmak, my colleagues ignored the fact that McMullen had been relied on by the Second Circuit in Dellaventura: instead, they took pains to undermine the authority of McMullen, apparently reading it as inconsistent with Dellaventura.

The First Circuit opinion in Stockman, which was also cited as support in Sedmak, is consistent with this approach. In Stockman, the court found that it need not give weight to the Section 20(a) presumption in that case, stating

> [this] provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward." Pittston, supra, at 4703-04. This basic interpretative decision must precede any application of the presumption.

4 BRBS at 310-11, 539 F.2d at 269. The Stockman court thus also denied applicability of the presumption to basic interpretative issues. The court does not say that the presumption is wholly inapplicable. Rather, Stockman supports

the proposition that legal questions of interpretation must be settled before the presumption is applied to the underlying facts. In both Dellaventura and Stockman, the basic question did not involve the nature of an employee's employment, where the injury occurred, or any other question of fact. The courts' concern in both cases was with statutory interpretation involving the reach of the coverage provisions of the Act. In the context of this issue, the presumption was held inapplicable.

As I will demonstrate more fully below, application of the presumption to the facts of the instant case provides coverage for claimant under any interpretation of Section 2(3). The burden was on employer to show that claimant's employment did not involve activity within Section 2(3). However, claimant is nonetheless entitled to coverage in

this case even if the presumption is not applied, because the facts in the record can lead to no other conclusion.

Claimant was employed as a concrete finisher on the James River Bridge project. At the time of the injury, he was working in a concrete form on a piling, standing some eight to 10 feet above the water of the river. His work area was approximately one mile from shore and could be reached only by boat. Thus, claimant's injury occurred upon the "navigable waters" of the United States as defined prior to the 1972 amendments to the Act, and claimant would have been covered under the Act prior to the 1972 amendments. In my view, this fact is dispositive of coverage subsequent to the 1972 amendments to the Act. See my dissents in Gilliam v. Wiley N. Jackson Co., 12 BRBS 556, BRB Nos. 79-388/A (1980); Churchill

v. Perini North River Assoc., 12 BRBS 929, BRB Nos. 79-113/A et al. (1980); Sedmak. Thus, claimant was engaged in maritime employment within Section 2(3) of the Act on this basis alone.

Moreover, in my dissent in Gilliam, I fully discussed preamendment case law holding that employees engaged in bridge construction were engaged in maritime employment and thus were covered by the Act. See, e.g., Davis v. Department of Labor & Industries, 317 U.S. 249 (1942); Dixon v. Oosting, 238 F.Supp. 25 (E.D. Va. 1965); Peter v. Arrien, 325 F.Supp. 1361 (E.D. Pa. 1971) aff'd per curiam, 463 F.2d 252 (3d Cir. 1972). This case law is controlling authority for holding claimant in the instant case covered under the 1972 amendments to the Act.

My colleagues, however, have stated their view that preamendment law is not controlling, but serves only as a "useful

framework" for ascertaining coverage under the amended Act. However, it is disconcerting to realize the the "useful framework" language is cited primarily as a basis for refusing to apply pre-amendment law. See Miller v. Central Dispatch, Inc., 12 BRBS 793, BRB Nos. 78-467/A & 79-655/A (1980); Cunningham v. Sweco Inc.,11 BRBS 792, BRB No. 78-552 (1980); Holcomb v. Robert W. Kirk & Assoc., Inc., 11 BRBS 835, BRB No. 78-566 (1980). It is a rare case indeed where my colleagues would actually find pre-amendment precedent "useful." The Fourth Circuit in Brown & Root, Inc., v. Joyner, 11 BRBS 86, 607 F.2d 1087 (1979), cert. denied, 100 S.Ct. 2960 (1980), found it unnecessary to consider whether Congress intended the 1972 amendments to the Act to exclude employees of maritime businesses who would have been covered before 1972 because their injuries

occurred on navigable waters regardless of the nature of their work. However, the court stated "we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 11 BRBS at 97, 607 F.2d at 1090 (emphasis added). In the instant case, as discussed above, there is ample precedent under the pre-amendment Act supportive of a finding that claimant was engaged in work which is maritime in nature.

Case law decided prior to the 1972 amendments to the Act contains analysis supportive of coverage which is certainly "useful". While I cannot agree with my colleague's Sedmak definition of maritime employment, claimant in this case was clearly engaged in "maritime activities involving navigation and commerce." Although I do not agree with

my colleagues' focus on the purpose a structure is built to serve in ascertaining whether a claimant engaged in its construction is within this definition, I will highlight the case law and evidence which requires coverage of claimant in this case even under my colleagues' restrictive view.

In Peter v. Arrien, the court reversed a denial of benefits which was based on a finding that the construction or demolition of bridges was within state jurisdiction and was not maritime employment. The court stated that "[i]njuries to employees engaged in the construction or demolition of bridges are compensable under the Longshoremen's Act." 325 F. Supp. at 1365. The court therefore found that decedent, engaged in the demolition of a bridge by operating a crane from a cross way extending 300 feet into the river, was covered by the

Act. The court concluded that this worker was engaged in maritime employment and noted that his duties were directly concerned with a maritime purpose. In Morrison-Knudsen Co. v. O'Leary, 288 F.2d 542 (9th Cir. 1961), the court found an employee engaged in the construction of a dam covered by the Act. Analyzing the maritime nature of the employee's work, the Court found that the dam was being built "in aid of navigation." Thus, an employee killed during its construction was engaged in maritime employment. Construction of an offshore lighthouse was held to involve maritime employment in yet another pre-amendment case, Merritt-Chapman & Scott Corp. v. Bassett, 580 F.Supp. 488 (W.D. Mich. 1943). Even under the majority's view of the limited use of pre-amendment law, these cases provide a "useful framework" for holding claimant

covered under my colleagues' Sedmak definition.

My colleagues further ignore the clear facts in the record, which show that the James River Bridge Project will actually aid navigation on the James River. Instead, they characterize the bridge as an instrument of land transportation and find it is an obstruction to navigation, thus dismissing claimant's arguments. The clear and uncontroverted evidence is that the construction project was planned from the beginning with an intention to improve and increase navigation of the James River. Thus, this construction project, like those discussed above, actually aided navigation and was thus maritime in nature under even my colleagues' Sedmak definition.

The evidence on this point could not be clearer. A negative declaration of the Virginia Department of Highways

states "[t]he construction of a new bridge is intended to provide a safer crossing for the anticipated increase in traffic and greater clearance for waterborne traffic, than the existing bridge." Cl. Ex. 1, Negative Declaration, July 15, 1974, at 2. The negative declaration also states that "[t]he clearance between the main channel piers of the existing bridge provides too narrow a margin of safety for present day navigation. It poses particular difficulties for a series of barges being towed which have to negotiate the sharp turn from Hampton Roads just before passing under the bridge. The fender system has been hit by passing boats on many occasions." Cl. Ex. 1, Negative Declaration, July 15, 1974, at 3. An October 30, 1974, letter to the Commandant from the Commander, Fifth Coast Guard District, points out the following advantages of the new

bridge:

> The proposed bridge provides 100 feet more horizontal clearance than the existing bridge. The additional horizontal clearance allows more space for use by vessels passing each other beneath the bridge and reduces the chances of a vessel collision with the bridge. The proposed bridge provides 10 feet more vertical clearance than the existing bridge, which is expected to eliminate most draw openings except for ocean going ships.

Cl. Ex. 1, Letter of October 30, 1974, at 1. An April 4, 1978, negative declaration of the Virginia Department of Highways, Environmental Quality Division, states "the increased vertical and horizontal clearances of the proposed bridge will have a long term beneficial impact on the movement of waterborne traffic." Cl. Ex. 1, Environmental Assessment for James River Bridge, at IV. In addition, the Coast Guard District Commander stated that the James River is used by vessels ranging from

ocean going ships to small pleasure craft. The Commander continues: "No vessel known to the Coast Guard will be adversely affected by the proposed bridge. The proposed bridge would not limit any craft now using or expected to use the waterway." Cl. Ex. 1, Coast Guard Findings of Fact, at 2. These facts show that this project will, in fact, improve navigation on the James Ri-er. Therefore, construction of the bridge involves a maritime act.vity within my colleagues' understanding of the term.

It is irrelevant that claimant was engaged solely in work constructing the new bridge and not in demolishing the old one. To view claimant's work in the construction of the bridge without taking into account the purpose of the entire project is to ignore the evidence in the record. The evidence clearly establishes

that the new bridge would not have been permitted without the obligation to tear down the old one. See Cl. Ex. 1, Letter of May 12, 1972 (denying application for construction permit). Thus, one part of the project could not proceed without the other. To exclude any claimant from coverage solely on the basis that a construction project is non-maritime, as my colleagues would, is error. To exclude him because of the nature of a portion of the project compounds this error. Such a limited focus further narrows an already unduly restrictive view of coverage.

Not only does the test used by my colleagues restrict the scope of Section 2(3) in an unsupported manner, but it is applied in such a manner as to further narrow the test. My colleagues apply their Sedmak language as the sole means for an employee to qualify for

coverage as a maritime employee. The majority assumes that, since the Supreme Court has referred to a two-part test which is occupational, see P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979), it need not consider arguments relating to the requirements of working on navigable waters which are unique to that form of employment. Rather, the majority focuses narrowly on the nature of the project alone in order to determine coverage. However, the fact that a structure is being built over water dictates special conditions of employment. Work performed over water is not like working on land. As the Ninth Circuit noted in Duncanson-Harrelson Co. v. Director, OWCP, 13 BRBS 308, F.2d, Nos. 78-1873, 79-7572 (9th Cir. May 8, 1981), an important factor in determining whether claimant is engaged in maritime employment is whether his"work exposed him to many of the

'perils of the sea' associated with traditional maritime activity." 13 BRBS at 310. In this case, it is undisputed that claimant had to wear a life jacket and could move only a few feet in either direction without falling into the water. Moreover, his work site could be reached only by boat, and it was by boat that he was conveyed to shore after his injury. Such occupational factors clearly illustrate that the fact a claimant was required to perform his work on navigable water should control the outcome.

The majority here narrowly applies an already restrictive test to exclude claimant from coverage. They also narrow the scope of the Act by refusing to apply the presumption in Section 20(a), which requires that employer submit substantial evidence indicating claimant was not covered. Not only is there a total absence of such evidence, all evidence

admitted is supportive of coverage.

My colleagues' restrictive view of Section 2(3) requires that the facts in the instant case be ignored and the law twisted so that claimant might be held outside the jurisdiction of the Act. This is contrary to the established principle that the Act is to be construed in conformance with its beneficent purpose. As the Supreme Court stated in Northeast Marine Terminal Co. v. Caputo, 6 BRBS 150, 161, 432 U.S. 249, 268 (1977), "[t]he language of the [1972] Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." My colleagues in this case deny coverage to a claimant who would have been covered prior to the 1972 Amendments. Such a result is clearly inconsistent with the intention of Congress:

> Section 2(a) amends section 2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net. [Emphasis added.]

S. Rep. No. 1125, 92d. Cong., 2d Sess. 16 (1972); H. Rep. No. 1441, 92d Cong., 2d Sess. 14 (1972). Claimant herein is deprived of coverage to which he is fully entitled. I dissent.

/s/ Julius Miller

JULIUS MILLER
Administrative Appeals Judge.

Dated this 11th day
of June 1981

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700 - 1111 20th Street, N.W.

In the Matter of

HOWARD E. LEMELLE

Claimant

v.

B. F. DIAMOND CONSTRUCTION COMPANY INCORPORATED

Employer

and

THE AETNA CASUALTY AND SURETY COMPANY

Carrier

Case No. 79-LHCA-84

OWCP No. 5-19771

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BEFORE:
PETER MCC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for permanent total disability under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (hereafter, "the Act").

A hearing was held in Norfolk, Virginia, on April 3, 1979.

Having considered the entire record, including the testimony, exhibits 1/ and briefs of the parties and having observed the demeanor of the witness, I make the following findings of fact, conclusions of law and decision and order based thereon.

1/ Following the hearing, claimant's counsel submitted medical reports of three physicians. These have been marked Claimant's Exhibits #5 and #6 and entered in evidence.

Statement of the Case

Claimant was injured in the course of his employment with respondent employer on November 23, 1977. Notice and claim were timely given and filed. Controversion was filed some weeks later. 2/

At the time of injury, claimant was working as a cement finisher on the new James River Bridge.

Findings of Fact and Conclusions of Law

The facts are as stated.

The statement is brief because the claim must be dismissed for lack of coverage by the Act.

Counsel for respondents has relied in substantial part upon the decision of my colleague in Broome v. B. F. Diamond Construction Co., 5 BRBS 69 (ALJ) where another of respondent's employees working

2/ Though opportunity was given counsel for the submission of the controversion form, it is not in the record.

on the James River bridge was found not to be engaged in maritime employment. Ordinarily, the decisions of administrative law judges constituting no precedent, it would be with considerable caution that such a decision could be regarded as authority. In this case, although the Benefits Review Board did not review the Broome case, it has cited and distinguished it with apparent approval in its decision in Dantes v. Western Foundation Corporation Association ____ BRBS ____, BRB No. 78-517, May 21, 1979, p. 5 n. 2.

Accordingly, I find that claimant herein was not engaged in maritime employment and that his claim is not within the coverage of the Act.

Order

The claim of Howard E. LeMelle is denied.

PETER McC. GIESEY
Administrative Law Judge

Dated: August 2, 1979

Washington, D.C.

Office - Supreme Court, U.S.
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No. 81-2362

In the Supreme Court of the United States

OCTOBER TERM, 1982

B.F. DIAMOND CONSTRUCTION COMPANY, INC., ET AL., PETITIONERS

v.

HOWARD LEMELLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether a worker injured on actual navigable waters while building a bridge designed to improve river navigation is engaged in "maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 674 F. 2d 296. The opinion of the Benefits Review Board (Pet. App. B-1 to B-34) is reported at 13 Ben. Rev. Bd. Serv. (MB) 542. The decision and order of the administrative law judge (Pet. App. C-1 to C-5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Howard LeMelle, an employee of petitioner B.F. Diamond Construction Company, was injured while constructing a bridge across the James River at Newport News, Virginia. The construction project involved demolishing an old bridge and replacing it with a new structure at the same location (Pet. App. A-3, B-5). On the day of his injury, LeMelle was working as a cement finisher on a fixed section of the new bridge, located approximately one mile from shore and eight to ten feet above the water (*id.* at A-3, B-3 to B-4). His job site could be reached only by boat and his work required him to be continually over the water (*id.* at A-3 to A-4, B-4). LeMelle was injured when 200-300 pounds of mixed concrete fell on him (*id.* at B-3).

LeMelle filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* The administrative law judge (ALJ) denied LeMelle's claim, holding that he was not a covered employee because he was not "engaged in maritime employment" as required by Section 2(3) of the Act, 33 U.S.C. 902(3). The ALJ's decision was based solely on a prior unreviewed ALJ opinion denying coverage to another of petitioner's employees working on the same bridge (Pet. App. C-3 to C-4).

LeMelle appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). The Board affirmed the denial of benefits in a 2-1 decision, holding that LeMelle's bridge construction work did not constitute "maritime employment" because it did not have a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (Pet. App. B-4). See *Sedmak* v. *Perini North River Associates,* 9 Ben. Rev. Bd. Serv. (MB) 378, rev'd *sub nom. Fusco* v. *Perini North River Associates,* 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, aff'd on

remand, 622 F. 2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981). The Board rejected LeMelle's argument that coverage was appropriate here because the bridge would actually aid navigation by allowing greater clearance for river traffic than the old bridge. While the Board noted that "documents admitted into evidence * * * indicate that the project was planned [in part] to improve * * * the navigation of the James River" (Pet. App. B-5), it nevertheless ruled that "a claimant engaged in bridge construction [is] not within the *Sedmak* definition of maritime employment, notwithstanding the fact that he [is] 'working on a portion of the bridge that was designed to avoid obstruction of navigation' " (*id.* at B-7; citation omitted).[1]

LeMelle sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of LeMelle's petition for review. The court granted the petition and held that LeMelle was covered under the Act. The court reaffirmed its earlier decision " 'that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' " to the Act (Pet. App. A-8, quoting *Brown & Root, Inc.* v. *Joyner*, 607 F. 2d 1087, 1090 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980)). "It is not necessary," the court

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[1]Board Member Miller dissented on several grounds. He relied in part on his view that all work performed over the water constitutes maritime employment (Pet. App. B-31 to B-32) and that employees covered before the 1972 amendments to the LHWCA, including bridge construction and demolition workers, remain covered under the amended Act as "maritime" employees (*id.* at B-20 to B-23). He also believed that, even if a "significant relationship to * * * navigation and commerce" is required, LeMelle would be covered because "[t]he clear and uncontroverted evidence is that the construction project was planned from the beginning with an intention to improve and increase navigation of the James River" (*id.* at B-26).

said, "to relate again the tortured history of employee coverage under the LHWCA, except to note that bridge construction and demolition workers employed over navigable water were covered prior to the 1972 amendments" (Pet. App. A-7 to A-8; citations omitted). For this reason, the court held that "the claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment" under the Act (*id.* at A-9):

> Although bridge demolition and construction is not classically maritime work under the "ancient traditions of the sea," it has long been merged with such work by the exigencies of modern coastal land and sea traffic. Essential to improving navigation and possessing many of the same hazards and working conditions as more traditional work on navigable waters, such employment carries with it the fundamental elements of what historically has been regarded as maritime employment.

DISCUSSION

The court of appeals correctly resolved the LHWCA coverage issue in this case. The court correctly held that a bridge construction worker who would have been covered prior to the 1972 amendments to the LHWCA and whose job on the water was traditionally viewed as maritime employment retained coverage under the amended Act. This ruling, however, conflicts with a recent decision of the Second Circuit that denies benefits to a marine construction worker who was injured on actual navigable waters. *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), cert. granted *sub nom. Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (Feb. 22, 1982). Because of this conflict, we suggest that the Court hold this petition in abeyance, pending decision in the *Perini* case.

1. The decision below is correct for the reasons stated by the court of appeals. Bridge construction and demolition workers injured over actual navigable water were covered prior to congressional modification of the LHWCA in 1972. See *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F. 2d 657 (5th Cir. 1968); *Peter* v. *Arrien*, 325 F. Supp. 1361 (E.D. Pa. 1971), aff'd, 463 F. 2d 252 (3rd Cir. 1972). The court below correctly concluded that " 'employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' "(Pet. App. A-8 to A-9, quoting *Brown & Root, Inc.* v. *Joyner, supra*, 607 F. 2d at 1090).

As fully discussed in the Director's brief in *Perini*, Congress in 1972 moved the coverage of the LHWCA shoreward to include workers engaged in maritime employment who were injured on new, broadly defined "navigable waters" adjacent to the water's edge. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expand coverage "to protect *additional workers.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3) "does not exclude * * * employees traditionally covered * * *." S. Rep. No. 92-1125, *supra*, at 16. Thus, a bridge construction worker injured on actual navigable waters, like LeMelle, remains covered as an employee engaged in "maritime employment." See *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034 (5th Cir. 1982) (en banc).[2]

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[2]Contrary to petitioners' argument (Pet. 4-5), Section 2(3) does not limit coverage to longshoring, harbor work and shipbuilding. The status provision defines a covered "employee" as "any person engaged in maritime employment, *including* any longshoreman or other person

2. Although the ruling below is correct, it conflicts with decisions of the Second Circuit that deny coverage to maritime construction workers injured over actual navigable waters. In *Fusco* v. *Perini North River Associates, supra,* 622 F. 2d at 1112-1113, the Second Circuit denied coverage to two workers engaged in constructing a sewage treatment plant on actual navigable waters. The court specifically rejected (*id.* at 1113) the argument adopted by the Fourth Circuit that " 'employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' " (Pet. App. A-8 to A-9).

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engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *" (33 U.S.C. 902(3); emphasis added). Even assuming that a bridge builder does not qualify as a "harborworker," the specified categories are clearly not an exhaustive list of "maritime employment." See *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69, 77-78 n.7 (1979); *Trotti & Thompson* v. *Crawford,* 631 F. 2d 1214, 1220 (5th Cir. 1980).

Petitioners also contend (Pet. 8-11) that the court below exceeded its authority by overturning the Board's "finding of fact" that the bridge project on which LeMelle was working was not an aid to navigation. There is no merit to this contention. The court of appeals, correctly viewing the question before it as one of law, simply ruled that bridge construction, which traditionally had been considered to be maritime work and was covered before the 1972 amendments, retained its status as "maritime employment" under the amended Act (Pet. App. A-8). The court merely incorporated into this legal holding the undisputed fact that the bridge in question was designed "in part" to improve the navigation on the James River (*id.* at A-9). The Benefits Review Board itself emphasized that its resolution of the coverage issue in this case did not depend upon whether the James River bridge actually aided navigation. As the Board stated, "there are no factual issues at [*sic*] dispute in this case. Claimant was engaged in bridge construction. The issue is thus one of legal interpretation, *i.e.,* whether bridge builders are maritime employees within the meaning of Section 2(3)" (Pet. App. B-6 n.2).

In *Churchill* v. *Perini North River Associates, supra,* the Second Circuit relied on its ruling in *Fusco* to deny coverage to another marine construction worker even though that worker was injured while he was on a barge in actual navigable waters. In addition to arguing that Churchill was covered because he would have been covered before the 1972 amendments extended coverage under the LHWCA, the Director argued that Churchill was covered because his duties at the time of injury included the unloading of caissons and other material from supply barges. The Second Circuit, however, rejected these arguments and denied coverage.

On February 22, 1982, this Court granted the Director's petition for a writ of certiorari in *Churchill* v. *Perini North River Associates, supra.* That case presents the question whether "a marine construction worker injured while working on actual navigable waters is 'engaged in maritime employment' within the meaning of Section 2(3) of the [LHWCA]" (81-897 Pet. I). Because the resolution of that question will likely control or substantially influence the resolution of this case,[3] we believe that the Court should hold this petition in abeyance pending its decision in *Perini.*

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[3]If this Court holds in *Perini* that marine construction workers who are injured on actual navigable waters remain covered under the amended LHWCA, LeMelle unquestionably would be entitled to benefits.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* No. 81-897.

Respectfully submitted.

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Petitioners,

v.

HOWARD LEMELLE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DEPARTMENT OF LABOR,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petition in No. 81-2362 for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 25, 1982.

INTEREST OF THE AMICUS CURIAE[1]

The Associated General Contractors of America, Inc. is a national trade association consisting of 113 state and local

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36 (2). Letters of consent are on file with the Clerk of this Court.

chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning the construction industry.

The specific question presented in this case is whether the Fourth Circuit erred in determining that a construction worker was engaged in maritime employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") while pouring and vibrating concrete on a bridge over navigable waters and where the employee was not engaged in any work traditionally associated with longshoring, harbor work or shipbuilding. A review of the Fourth Circuit's decision is vital to the interests of the AGC and its members because, although construction employees have historically been covered by state workers' compensation plans, the practical result of the decision below is to shift coverage for virtually all construction employees working on bridges over navigable waters to the LHWCA. This result is in conflict with the decisions of other circuits. Accordingly, until this issue is resolved by this Court, the AGC and its members will be subject to conflicting and confusing requirements governing LHWCA coverage of its employees which will have a significant impact upon the costing and bidding of contracts, and which poses substantial business risks associated with potentially inadequate insurance coverage

and, in some cases, the unavailability of LHWCA insurance in the construction field.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit Has Discarded The Occupational Analysis Required By This Court's Decisions And Has Unjustifiably Extended LHWCA Coverage To Virtually All Bridge Construction Workers

This case presents the issue of whether a bridge construction worker performing the same duties as he would on land, and not engaged in longshoring, harbor work, or shipbuilding, can be properly classified as an employee engaged in "maritime employment" within the meaning of § 2(3) (and thus be eligible for compensation under § 3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "Act").[1] The Fourth Circuit held that he could (A-2).[2] This ruling is in direct conflict with the decisions of this Court in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), and *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979). For as we show below, the requirements established by Congress and approved by this Court—that coverage under the Act is limited not only to those injuries sustained on navigable waters and adjoining areas *but also* only to those employees engaged in longshoring, harbor work and related employment—have been totally cast aside by the Fourth Circuit. As a result, the breadth of LHWCA coverage has been unjustifiably expanded in contravention of Congressional intent and the dictates of this Court to include virtually all construction workers engaged in traditional construction crafts while working on bridges over navigable waters.

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[1] 33 U.S.C. §§ 902(3), 903.

[2] References to "A-__," "B-__" and "C-__" in this section are to the Appendix to the Petition for a Writ of Certiorari in this case.

In *Caputo*, this Court found that in 1972, when Congress sought to correct the anomalies of the *Jensen* line test,[3] it decided to "describe affirmatively the class of workers [it] desired to compensate." 432 U.S. at 264. Thus, while expanding the situs or geographical area of coverage under the LHWCA, Congress also sought through the 1972 Amendments to limit eligibility for coverage by imposing a "status" test (432 U.S. at 264-65):

> [Congress] therefore added the requirement that the injured worker be engaged in maritime employment, which it defined to include any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 33 USC § 902(3). The 1972 Amendments thus changed what had been essentially only a situs test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured.

Similarly, in *Ford*, 444 U.S. at 78, the Court stated:

> The Act . . . contains distinct situs and status requirements. The situs test of § 3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. *Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in maritime employment.* This section defines the Act's *occupational* requirements. (emphasis supplied)

Accordingly, under the authority of both *Caputo* and *Ford*, claimant LeMelle would be eligible for LHWCA benefits only if he satisfied the dual requirements of having worked at a

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[3] See 432 U.S. 256-64.

maritime situs[4] and having been employed in a maritime occupation.

The Fourth Circuit here, while paying lip service to the mandate that a claimant must qualify under both a situs and a status test (A-5), gave no actual consideration to the claimant's occupation (construction worker) or even to the nature of the work he was performing at the moment of injury (A-3). Rather, it limited its analysis to the effect on navigation of the bridge upon which LeMelle was pouring and vibrating concrete, a factor relevant to situs but not status, and concluded that insofar as the new bridge was designed in part as an "aid to navigation" (in that the new bridge would provide greater waterway clearance than the old one),[5] LeMelle was engaged in maritime employment (A-9). This reasoning simply ignores this Court's, and Congress', emphasis on the occupation of the particular claimant and the requirement that his status as an alleged maritime employee be examined independently from the situs of his work. As this Court has explained, and as the Fourth Circuit evidently forgot, "the crucial factor [in determining status] is the nature of the activity to which a worker may be assigned." 444 U.S. at 82.

Moreover, it is apparent that the Court below not only failed to apply the proper *Caputo/Ford* test to determine maritime employment status, but also, had it applied the proper analysis, would have been required to find, as did the ALJ and the Board below, that LeMelle was not engaged in maritime employment.

As noted above, § 2(3) of the Act defines an employee engaged in "maritime employment" as "including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder or shipbreaker . . . ." No contention has been or reasonably can be raised in this

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[4] It was conceded below that, insofar as LeMelle was working on a bridge being constructed over navigable waters, his claim satisfied the situs requirement (A-3-4-6).

[5] Even in this respect the Court substituted its judgment on a factual issue for that of the Benefits Review Board, the administrative body with presumed expertise in such matters (see B-6-9).

case that a bridgeworker engaged in the pouring or vibrating of concrete is performing work of the same or reasonably related character to that performed by longshoremen or harborworkers.

In addition, the legislative history of the Act clearly shows that Congress did not intend workers in such separate and unrelated occupations to be eligible for LHWCA coverage. *See* H.R. Rep. No. 92-1441. For the status requirement "focuses upon the nature, not the location of employment . . . it does not extend coverage to all workers in the situs area." 444 U.S. at 83. As this Court has stated, Congress clearly intended to cover "workers engaged in the essential elements of unloading a vessel . . . [however] persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." 432 U.S. at 267. Thus, for example, as Congress has explained, and this Court has recognized, "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transport are not covered." *Id.* There is, we submit, no meaningful difference between that hypothetical truck driver and LeMelle, as neither is "engaged in the overall process of loading and unloading vessels." *Id.*

Moreover, the legislative history of the 1972 amendments to the LHWCA and the testimony offered to Congress at that time give no indication that industries other than longshoring, harborworking, and shipbuilding were intended for coverage. For example, at the *Hearings before the Subcommittee on Labor of the Committee on Labor & Public Welfare, United States Senate, on S.2318, S.525, and S.1547*, 92nd Cong., 2nd Sess. (1972), testimony was heard only from representatives of longshoremen, harborworkers, stevedores, shipbuilders and workers in similar maritime occupations. The list of witnesses, statements and additional information of the *Hearings* (see Appendix A of this brief) reveals that no testimony was heard or apparently sought from members of industries outside of traditional maritime fields, clearly indicating that Congress did not contemplate expansion of coverage to construction work and other nonmaritime industries. Moreover, under simultaneous consideration in 1972 was S.1547 (to apply the LHWCA to maritime

petroleum workers), thus indicating that when Congress intended to consider extending LHWCA coverage to a separate industry unrelated to those enumerated in Sec. 2(3), it did so plainly and publicly.

Finally, it should be emphasized that, in *Ford*, this Court recognized that Congress intended to apply a "uniform standard of coverage" that would not vary for employees performing the same tasks depending upon their situs of work. 444 U.S. at 83. The Fourth Circuit's decision here directly thwarts this goal since it would permit LHWCA coverage for an employee pouring concrete on a bridge while denying that coverage to a co-employee performing identical work on the roadway approach to the bridge only a few feet away.

2. *The Analysis For Determining LHWCA Coverage Utilized By The Fourth Circuit Conflicts With The Rationales And Decisions Of Other Circuits*

Although various circuits have devised somewhat different approaches to coverage under Sec. 2(3), no other Court of Appeals has repudiated the *Caputo/Ford* occupational analysis as did the court below. *See e.g., Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 275 (1st Cir., 1976), *cert. denied*, 433 U.S. 908 (1977) (Court looks at "nature of [the workers'] regularly assigned duties as a whole"); *Fusco v. Perini North River Assoc.*, 622 F.2d 1111 (2nd Cir., 1980), *cert. denied*, — U.S. —, 101 S. Ct. 959 (1981) (the work must have a significant and realistic relationship to maritime activities, and coverage may not be based upon locus alone); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir., 1978), *cert. denied*, 441 U.S. 909 (1978) (worker must be directly involved in loading or unloading either in his overall occupation or at the moment of injury); *Weyerhaeuser v. Gilmore*, 528 F.2d 957 (9th Cir., 1976), *cert. denied*, 429 U.S. 868 (1976) (employee's *own* work must have realistically significant relationship to traditional maritime activity). Under none of these traditional approaches would a construction worker pouring concrete on a bridge be deemed in maritime employment.

Two recent decisions, although both finding employees working on a bridge to be covered by LHWCA, are consistent with

Petitioner's position regarding the "status" analysis because the claimants in those cases, unlike LeMelle, were involved in loading and unloading—traditional longshoring activities. Thus, in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., 1981), the Court found that claimant was injured while supervising and assisting in the off-loading of pilings from a barge "and, hence, was engaged in longshoring activities at the time he was injured. It is that simple." 659 F.2d at 58. Similarly, the Eleventh Circuit, in *Browning v. B. F. Diamond Const. Co.*, ___ F.2d ___ (1982), found that claimant there was involved in loading and unloading and, hence, was covered under the *Gilliam* rationale. Since the basis for the Fourth Circuit's decision is that LeMelle was merely working on a bridge deemed to be an "aid to navigation," and there is no finding or contention that he was engaged in traditional longshoring activities, these bridgeworker cases lend no support to the faulty rationale of the court below.

In sum, the rationale for determining maritime employment status utilized by the Fourth Circuit is in direct conflict with the approaches and rationales employed by the other circuits, and, thereby, warrants a grant of certiorari to resolve this conflict.

3. *The Decision Below Raises Significant And Recurring Problems Fundamentally Affecting The Construction Industry*

The decision below poses a significant threat not only to the integrity of the LHWCA but also to construction contractors required to make fundamental business decisions which are affected by actual or potential employee coverage under the Act. The Fourth Circuit's decision raises the threat that employees, who traditionally have been protected by state worker's compensation programs, and have been primarily, if not exclusively, engaged in land-based activities, will suddenly be termed maritime employees for LHWCA purposes because these employees may spend a brief part of their working time on the bridge portion of a project. The serious, practical implications of this problem for the construction industry are discussed below.

A. Confusion in bidding

At present, a construction contractor must carefully analyze each project for possible application of the LHWCA. However,

since there are no set criteria for LHWCA coverage because of the ambiguity of the law, which has been intensified by the decision below, the contractor must take a significant business risk in either including the expensive insurance coverage in his bid, thereby raising his bid and increasing the likelihood of being underbid, or omitting the insurance coverage and exposing his firm to unexpected judicial expansion of the LHWCA and to large financial loss from an injured employee's claim for LHWCA benefits (see Appendix E-7).

For example, a contractor must often bridge rivers or streams during the execution of a highway contract. The activities are hardly of a longshoring or harborworking nature although the body of water may be technically "navigable." The workers perform exactly the same duties as they do on land and engage in no activity that could be meaningfully called "maritime employment." Yet the contractor must decide whether he should add to his bid the extra cost of insurance to cover the possible LHWCA exposure. As the decision below evinces, the scope of coverage may expand widely from one moment to the next, and the contractor has no reliable guidelines with which to make an intelligent decision.

B. Increased cost for LHWCA premiums

Construction contractors are required by state statute to provide workers compensation for their employees. *Id.* The cost for this coverage is a function of benefit levels established by the states and the loss experience of the contractor. Despite this coverage for employees, contractors, in order to protect themselves against unjustifiably expansive interpretations of the Act such as in the instant case, must increase their bids by the amount of premiums for Longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by any state. For example, the rates for LHWCA coverage were 252 percent higher than workers' compensation rates for a project bid in the State of California (see Appendix E-9). When it is taken into consideration that workers' compensation premiums account for approximately 5 percent of a contractor's bid, the cost for this project in

California, for example, has been found to increase by approximately 7 percent. *Id.* In the State of Florida, rates for LHWCA coverage are 160 percent higher than the rates for state compensation. *id.*

The premium rates reflect the benefit levels which the employer must pay to his employee. Under the LHWCA, benefit payments are significantly higher than those established by state compensation laws. For example, in 1980, the maximum compensation rate under the LHWCA was $456.24. In Connecticut, the maximum state benefit rate was $285.00; in Louisiana, $163.00; in Georgia, $110.00; in Mississippi, $98.00 (see Appendix B). Moreover, LHWCA benefits have increased far more rapidly than related economic indices. Between 1972 and 1980, LHWCA benefits increased 551 percent, while the national average weekly wage increased only 73 percent, and the consumer price index increased only 97 percent (see Appendix C). As of January, 1981, the maximum weekly benefit under the LHWCA ($456.24—temporary, total disability, single individual) represented 169 percent of the average wage of the average covered employee and 200 percent of the national average weekly wage (see Appendix D).

C. Personnel problems resulting from the extention of LHWCA benefits to construction workers

As discussed *supra*, p. 7, this Court recognized in *Ford* that Congress intended to apply a uniform standard of coverage for similarly situated employees. On a highway construction project which includes a bridge over navigable waters, it would not be unusual for some employees to be pouring concrete on the roadway approach to the bridge at the same time other construction workers are pouring concrete on the bridge itself. Clearly the Fourth Circuit's decision, which would extend LHWCA coverage to the latter employees but not to the former, is both irrational and a frustration of Congressional intent. Moreover, such an irrational classification is bound to result in serious personnel problems and a likely increase in litigation for contractors who will have to attempt to explain to employees and/or their union representatives why two seemingly identically situ-

ated employees, who receive identical injuries, will nevertheless receive totally disparate benefits.

D. Availability of coverage

Conflict among the circuits and the unjustified expansion of what constitutes maritime employment, as illustrated by the case at bar, not only create confusion among contractors but also adversely affect contractors' ability to obtain appropriate insurance coverage of their potential LHWCA obligations. Many commercial insurers will not insure potential LHWCA exposures in the construction industry because, in their view, the open ended benefits provided by the Act make it virtually impossible for underwriters to determine future costs and, therefore, determine the proper price for coverage. In essence, it has been the experience of AGC's membership nationwide that, under these circumstances, LHWCA coverage is either unratable or provided only with large—and expensive—premium cushions (see Appendix E-11-12).

In sum, and aside from its legal deficiencies, the Fourth Circuit decision threatens to have a major adverse impact upon the construction industry by further obfuscating the scope of coverage under the LHWCA as it applies to construction workers who traditionally have been covered under state workmen's compensation laws. The resulting confusion, coupled with the high cost and limited availability of LHWCA insurance coverage, is likely to cause contractors on some projects to needlessly overbid and lose work while contractors in other cases may omit such coverage and incur a serious financial loss as a result of unwarranted judicial expansion of the Act over construction workers. These and the related practical problems discussed above make it imperative that this Court grant certiorari in this case in order to clarify the parameters of LHWCA coverage in the construction industry.

CONCLUSION

For the foregoing reasons, Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HEARINGS
BEFORE THE

SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON
LABOR AND PUBLIC WELFARE

UNITED STATES SENATE
NINETY-SECOND CONGRESS
SECOND SESSION
ON
S.2318

TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND FOR OTHER PURPOSES

S. 525

TO AMEND THE LONGSHOREMEN'S AND HARBOP WORKERS' COMPENSATION ACT TO IMPROVE ITS BENEFITS, AND FOR OTHER PURPOSES

S.1547
RELATING TO COMPENSATION IN THE CASE OF DISABILITY OR DEATH OF MARINE PETROLEUM WORKERS

MAY 2 ,10, 17, 24 and JUNE 5, 1972

Printed for use of the Committee on
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MAXIMUM COMPENSATION RATES
SELECTED MARITIME STATES vs. LHWCA
BY YEAR SINCE 1971

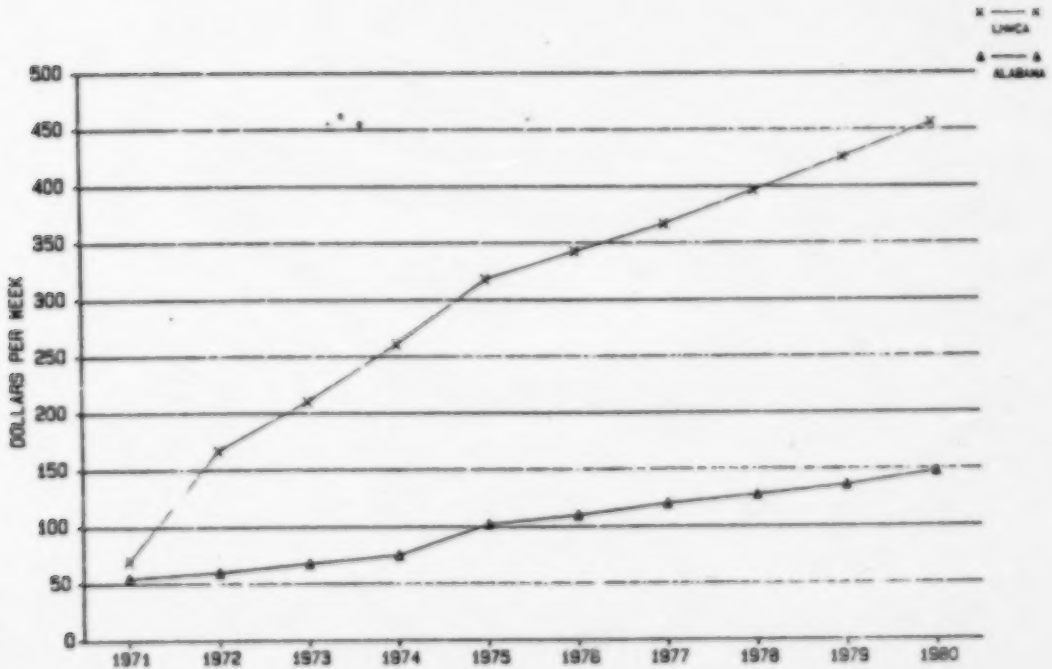
DATA AS OF JANUARY 1 OF SUCCEEDING YEAR

SOURCE: U.S. CHAMBERS OF COMMERCE
ANALYSIS OF WORKERS'
COMPENSATION LAWS

YEAR	ALABAMA	CALIFORNIA	CONNECTICUT	FLORIDA	GEORGIA	LOUISIANA	MAINE	MASS.	MISS.	N.J.	N.Y.	TEXAS	VIRGINIA	LHWCA
1971	$ 55.00	$ 70.00	$ 95.00	$ 56.00	$ 50.00	$ 49.00	$ 78.00	$77.00	$ 40.00	$101.00	$80.00	$49.00	$ 62.00	$ 70.00
1972	60.00	70.00	153.00	66.00	50.00	49.00	81.42	80.00	56.00	108.00	80.00	49.00	70.00	167.00
1973	68.00	119.00	168.00	80.00	65.00	65.00	83.00	90.00	56.00	108.00	80.00	63.00	80.00	210.54
1974	75.00	119.00	178.00	98.00	80.00	65.00	131.29	95.00	63.00	119.00	95.00	70.00	91.00	261.00
1975	102.00	119.00	189.00	112.00	95.00	85.00	141.41	95.00	63.00	128.00	95.00	70.00	149.00	318.38
1976	110.00	154.00	202.50	119.00	95.00	95.00	151.84	140.00	84.00	138.00	95.00	77.00	162.00	342.54
1977	120.00	154.00	220.50	126.00	95.00	130.00	220.88	150.00	91.00	146.00	125.00	91.00	175.00	367.22
1978	128.00	154.00	306.00	130.00	110.00	140.00	231.72	211.37	91.00	156.00	215.00	105.00	187.00	396.78
1979	136.00	154.00	261.00	211.00	110.00	149.00	306.23	227.21	98.00	185.00	215.00	119.00	199.00	426.26
1980	148.00	175.00	285.00*	228.00	110.00	163.00	322.17	245.48	98.00	199.00	215.00	133.00	213.00	456.24

(*to $427.50 in specified cases)

MAXIMUM COMPENSATION RATES
ALABAMA VS LHWCA
BY YEAR SINCE 1971



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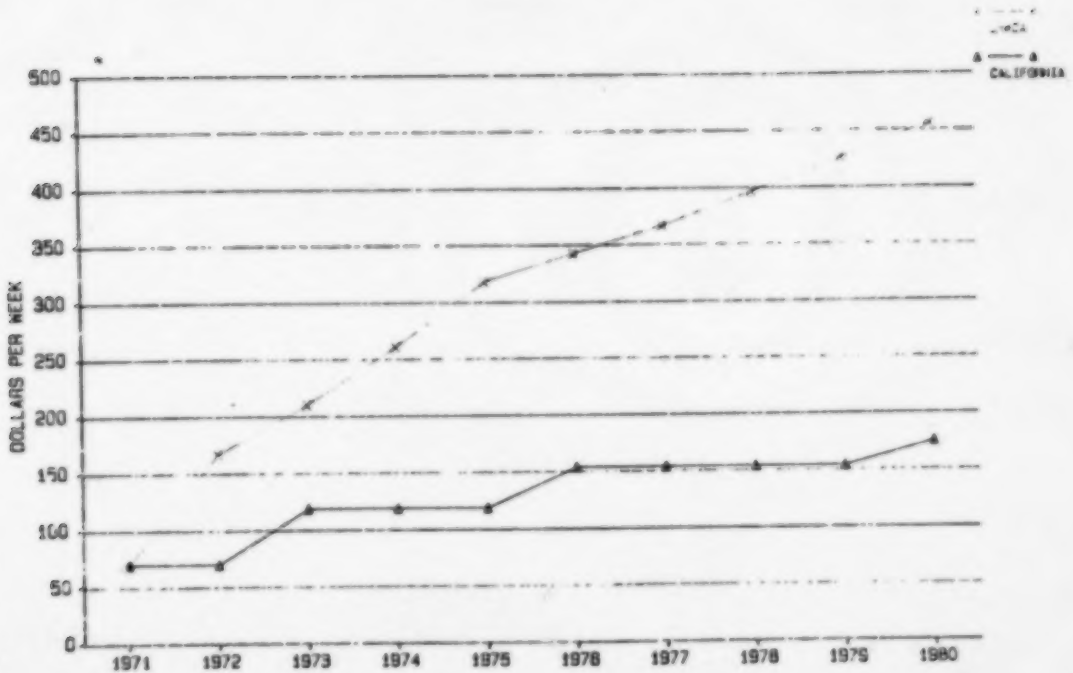
MAXIMUM COMPENSATION RATES
CALIFORNIA VS LHWCA
BY YEAR SINCE 1971



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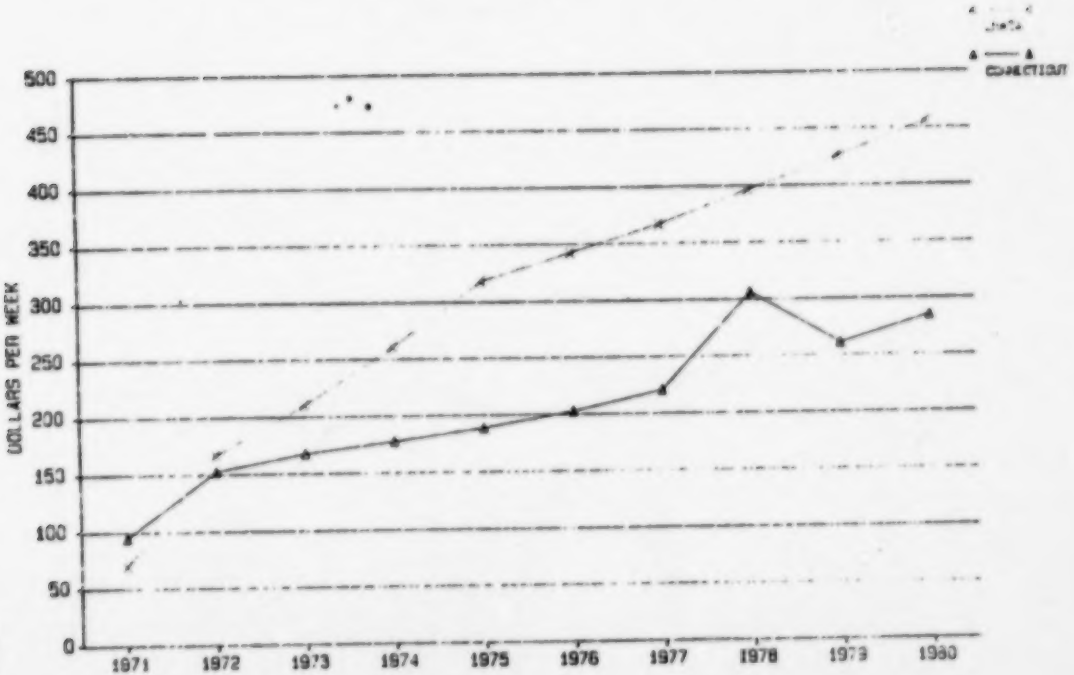
MAXIMUM COMPENSATION RATES
CONNECTICUT VS LHWCA
BY YEAR SINCE 1971



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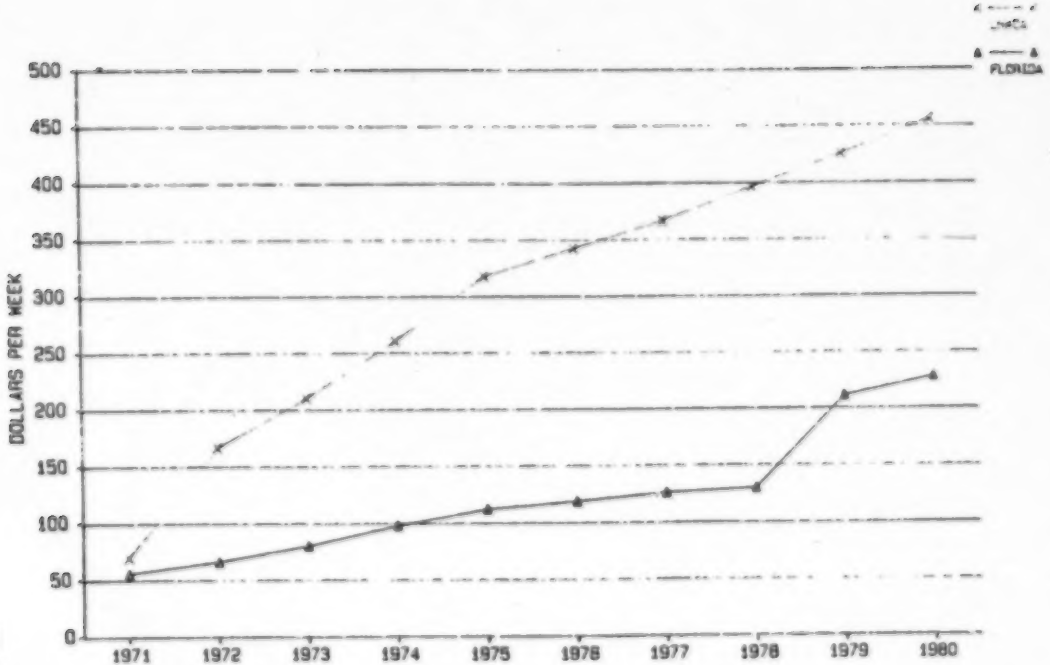
MAXIMUM COMPENSATION RATES
FLORIDA VS LHWCA
BY YEAR SINCE 1971



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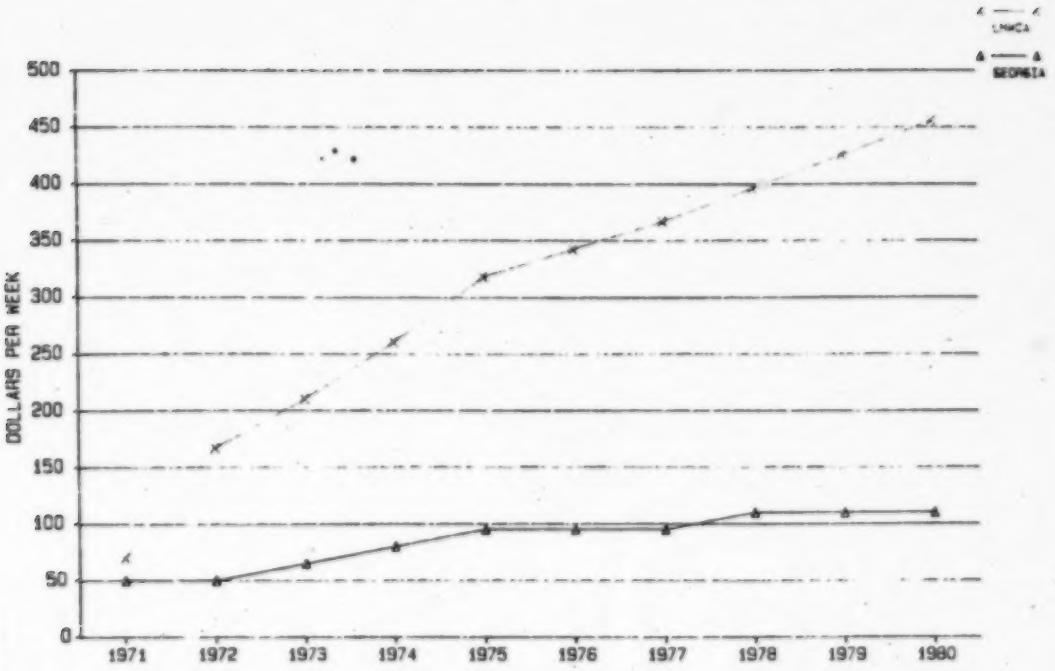
MAXIMUM COMPENSATION RATES
GEORGIA VS LHWCA
BY YEAR SINCE 1971



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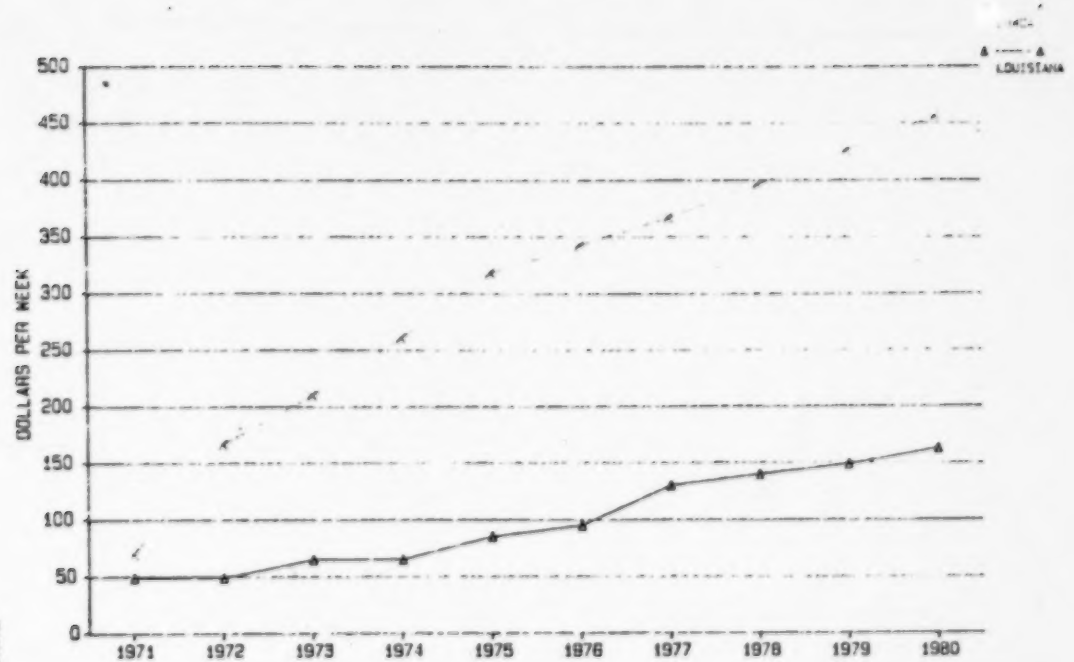
MAXIMUM COMPENSATION RATES
LOUISIANA VS LHWCA
BY YEAR SINCE 1971



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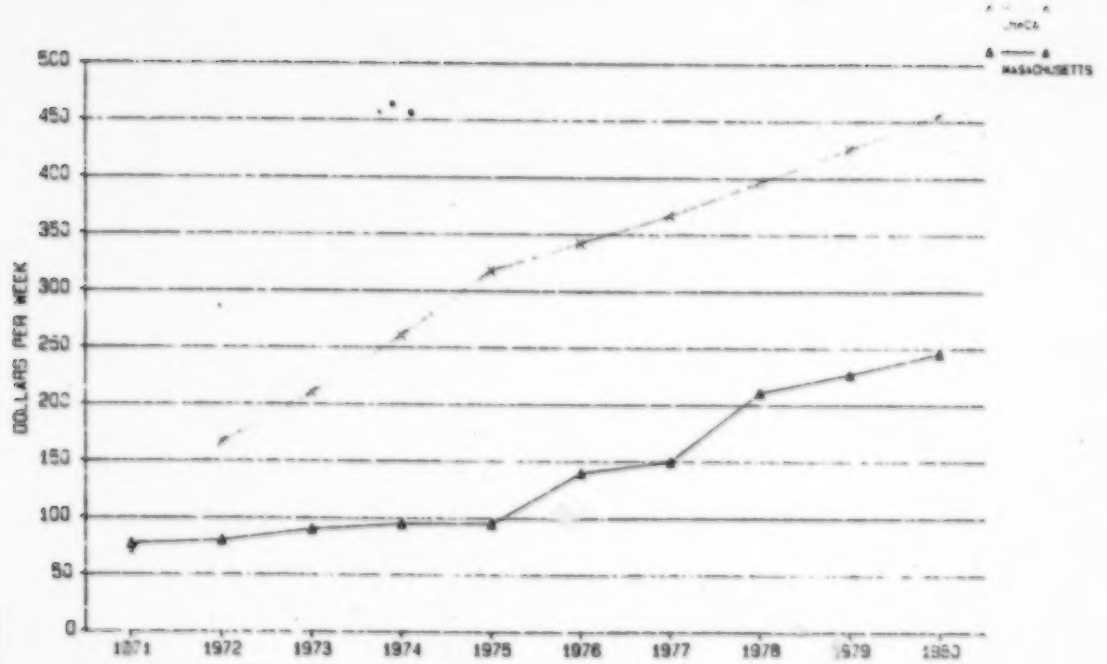
MAXIMUM COMPENSATION RATES
MASACHUSETTS VS LHWCA
BY YEAR SINCE 1971



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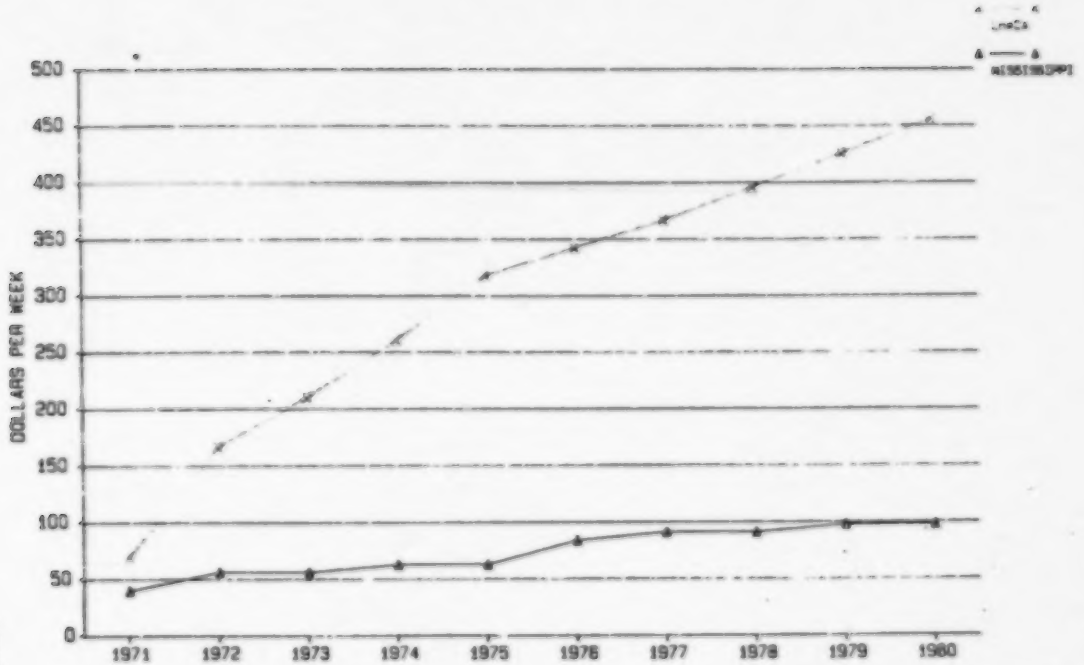
MAXIMUM COMPENSATION RATES
MISSISSIPPI VS LHWCA
BY YEAR SINCE 1971



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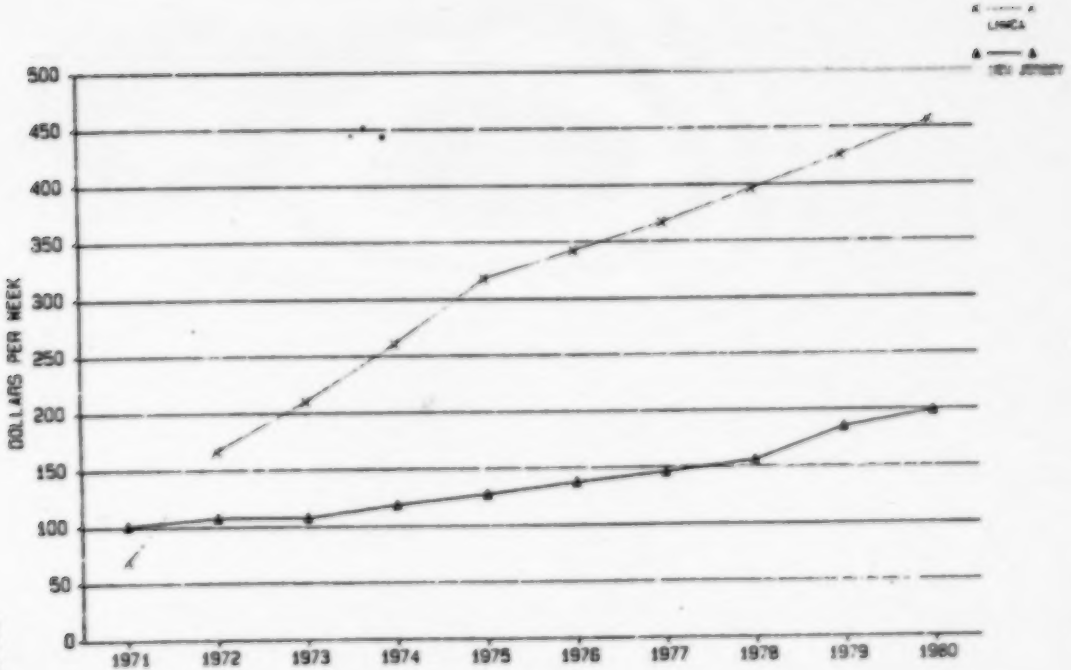
MAXIMUM COMPENSATION RATES
NEW JERSEY VS LHWCA
BY YEAR SINCE 1971



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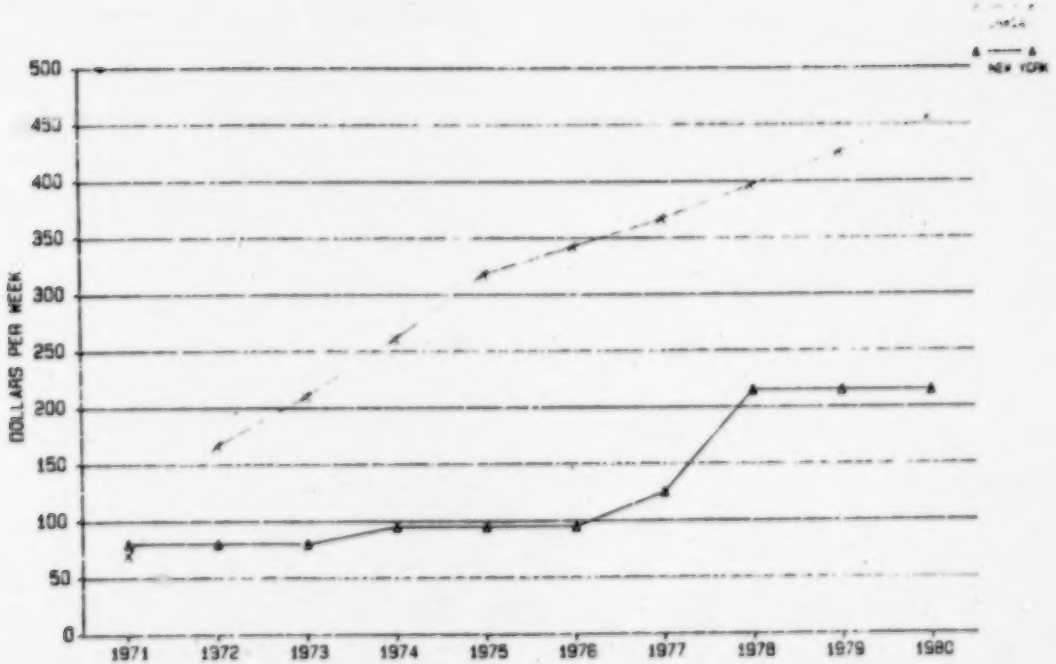
MAXIMUM COMPENSATION RATES
NEW YORK VS LHWCA
BY YEAR SINCE 1971



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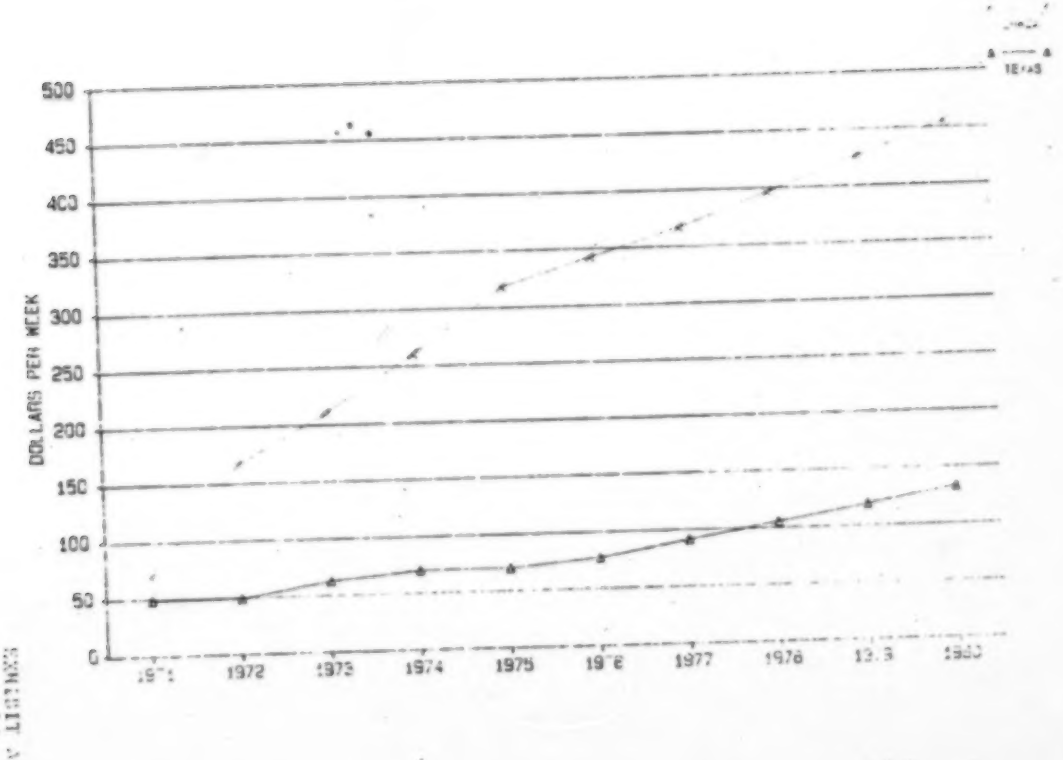
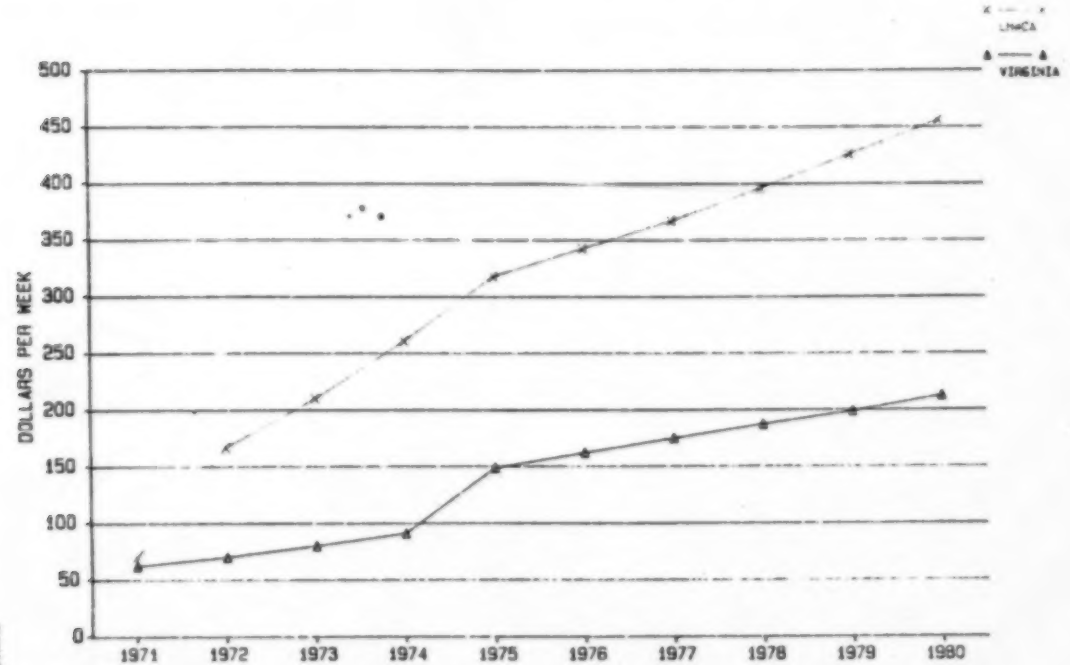
MAXIMUM COMPENSATION RATES
TEXAS VS LHWCA
BY YEAR SINCE 1971



MAXIMUM COMPENSATION RATES
VIRGINIA VS LHWCA
BY YEAR SINCE 1971



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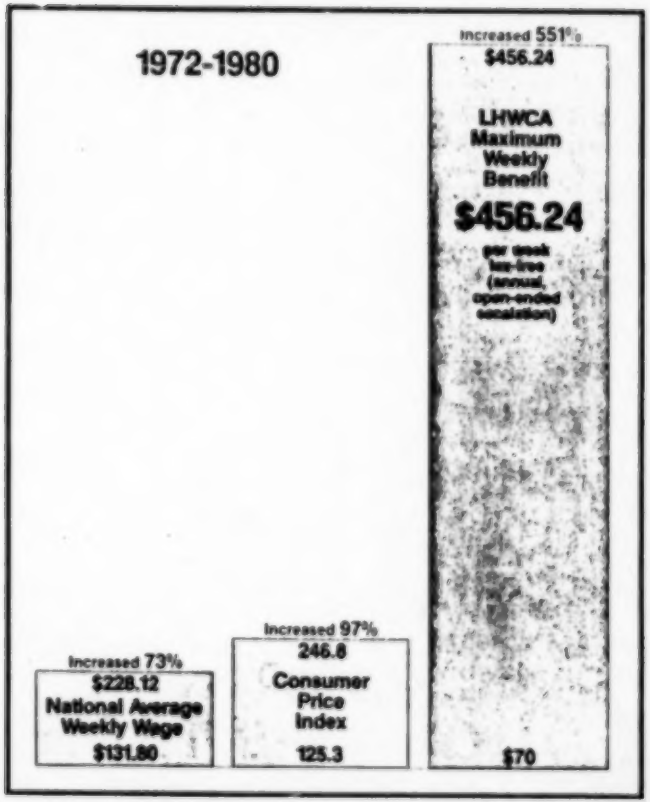
LHWCA Benefit Increases have far outpaced the growth of related economic indices



MAXIMUM WEEKLY BENEFIT

TEMPORARY TOTAL DISABILITY -- SINGLE INDIVIDUAL

States Represented on Senate Labor Committee

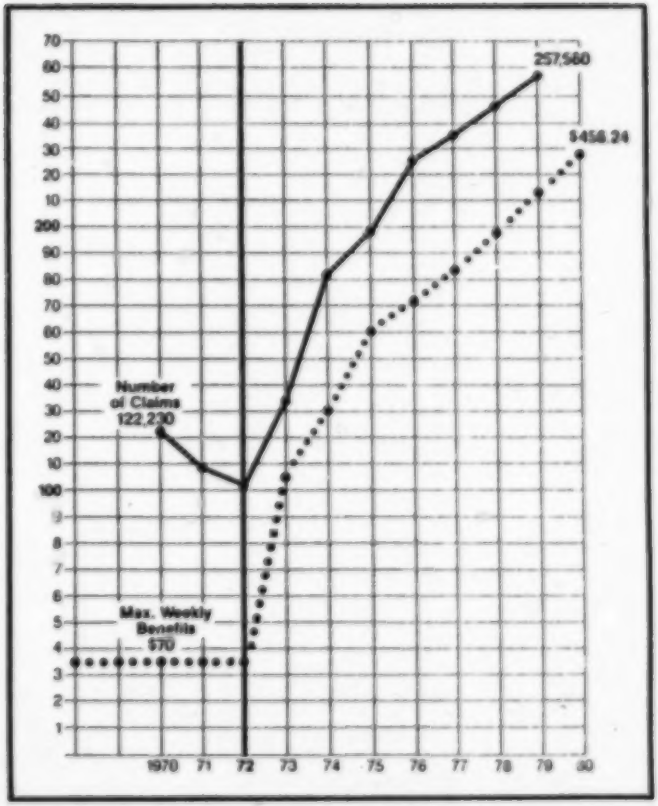
January 1, 1981

State	Benefit Amount	Maximum Relative to Average Wage of Covered Employee
LONGSHORE ACT	$456.24	169% (200% of national average weekly wage)
ALABAMA	148	66-2/3%
CONNECTICUT	285	100%
FLORIDA	228	100%
INDIANA	140	69% (no escalator)
MASSACHUSETTS	245.48	100%
MICHIGAN	181	90% (effective 1/1/82)
MISSOURI	150	66-2/3% (effective 8/13/81)
NEW HAMPSHIRE	213	100%
NEW JERSEY	199	75%
NORTH CAROLINA	210	100%
OHIO	275	100%
OKLAHOMA	155	66-2/3%
RHODE ISLAND	217	100%
UTAH	230	100%
VERMONT	208	100%
WEST VIRGINIA	262.08	100%
NATIONAL AVERAGE	228.32	90%

Prepared by Eric J. Oxfeld, Employee Benefits Attorney, Chamber of Commerce of USA
Telephone (202) 659-6083

Increase in Claims and Benefit Levels since 1972 Amendments to the Longshore Act

Since 1972, number of employees covered increased from 700-800,000 to 905,000



Source U.S. Dept of Labor Congressional Hearings

Testimony of
The Associated General
Contractors of America

Presented to the

Subcommittee on Labor of the

Committee on Labor and Human Resources

United States Senate

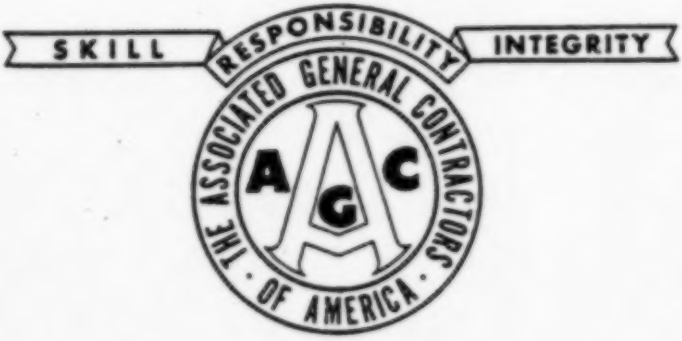
June 17, 1981

On the Topic of

Amendment of the U.S.
Longshoremen and Harbor
Workers Compensation Act

Presented by

Robert J. Massman



My name is Robert Massman, and I am a construction contractor from Kansas City, Missouri. I am here today representing the Associated General Contractors of America, a trade association representing 8,400 general contractors.

General contractors, particularly those involved in the construction of facilities on or over navigable water, have been aware of the United States Longshoremen's and Harbor Workers' Act for some time. It was not until recently, however, that the Longshoremen's Act became an ever-increasing problem not only for construction contractors who work on or over navigable water but also for contractors who work near water.

Jurisdiction Matters

Claims for Longshoremen's Act benefits by employees of contractors who operate on, over, or near water have increased greatly since the 1972 amend-

ments, as has the scope of exposure as to what sites are, or what sites could be, construed to be included under the Act. In most situations, the contractor is unaware that he is faced with a Longshoremen's Act exposure; nor, we believe, should a construction contractor have any reason to expect that his operations are subject to the Longshoremen's Act.

We suggest to this Subcommittee that the definition of maritime employment, as it appears in the Longshoremen's Act, was never intended to cover construction operations. Construction is certainly not, nor should it be construed as, maritime employment. Employees injured in the course of their employment while working for a construction contractor performing the same duties inland as they do when working near water.

Court of Appeals decisions support our position. In the Conti v. Norfolk and

Western Railway Company case, the Court found that the plaintiff's occupation was not of a traditionally maritime nature, but was that traditionally associated with railroading. More recently and more related to construction, the Second Circuit Court of Appeals made a similar decision.

Also supporting our view that construction should not and was not intended to be included under the Longshoremen's Act is the opinion by Judge Winter for the panel majority in the ITO Corporation of Baltimore v. Benefits Review Board. In this opinion, Judge Winter summarized the legislative history and background of the 1972 amendments to the Longshoremen's Act as follows:

> Section 2 and 3 of the present Act establish a dual test for coverage. the situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have

> been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to broaden the area in which an injury would be covered, and narrow the class of persons eligible to job function. Id. 1083

Clearly, construction is not a maritime or a longshoring operation, but rather the process of assembling material and building a structure.

The legislative history of the 1972 Amendments also indicates that Congress never considered, nor did it intend, tha the construction industry should fall under the purview of the Longshoremen's Act.

The logic behind the Congress' intent to expand coverage through the Amendments was to provide coverage for a worker who is not continuously engaged in Longshoring activity, but who spends some portion of his time in an employment satisfying the definition of maritime employment. However, merely because a worker is assigned

to work on or over nagivable water does not guarantee Longshoring status within the intent of the law. An employee whose primary occupation is construction work and who does not spend any portion of his time engaged in Longshoring activity should not be considered eligible for USL&H status.

Unfortunately, liberal interpretation of the Longshoremen's Act by administrative law judges, benefit review boards, and even some Appeals Courts have greatly contributed to the proliferation of claims for Longshoremen's Act benefits by injured employees of construction contractors as well as adding confusion as to whether or not an employee is covered by the Act. These bodies, through seemingly one-sided reasoning, have extended the Act to include more and more employees. This has resulted, unfortunately, in confusion, liability, and increased costs.

Confusion in bidding

At present, a construction contractor must carefully analyze each project to ascertain if Longshoremen's Act exposures are present. Unfortunately, since there is no hard, fast requirement or reason for Longshoremen's Act exposure in construction operations, due to ambiguity of the law, the contractor accepts a needless business risk in either including the expensive insurance coverage in his bid, increasing its monetary size and susceptibility to be underbid, or going without the insurance coverage and exposing his firm to large financial loss from an injured employee's claim for Longshoremen's Act benefits.

An illustration of the confusion caused by the Act is the situation where a highway contractor must bridge several streams of wading depth during the execution of a highway contract. Clearly, these streams are not capable of carrying

commercial traffic but are instead only suitable for pleasure and recreational boarting at most. The question to the contractor is whether he should add to his bid the extra price for insurance to cover the possible Longshoremen's Act exposure. As absurd as this example may seem, a contractor was actually confronted with it when his insurance agent advised him to secure coverage for these possible exposures.

Increased Cost for Longshoremen's Premiums

Construction contractors are required by state statute to provide workers' compensation for their employees. The cost for this coverage is a reflection of benefit levels established by the states and the loss experience of the contractor. Despite this coverage for employees, contractors, in order to protect themselves against liberal interpretations of the Act,

must increase their bids by the amount of premiums for Longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by the state. For example, the rates for USL coverage were 252 percent higher than workers' compensation rates for a project bid in the state of California. When it is taken into consideration that workers' compensation premiums account for approximately 5 percent of a contractor's bid, the cost for this project in the California example was increased by approximately 7 percent. In the state of Florida, rates for Longshoremen Act coverage are 160 percent higher than the rates for state compensation.

Even if a contractor only has minimal exposure to a possible Longshoremen's Act condition, he must carry an endorsement to his workers' compensation policy. This

endorsement can usually be obtained at no cost. However if a claim is ever made on this endorsement, Longshoremen's Act premiums are then assessed against the contractor who must, be necessity, reflect the cost of those premiums in his bids on future work.

Disparity Between State Programs & U.S. Longshoremen's Act

If the levels of compensation between state compensation rates and those of Longshoring activities remain excessively different, then the injured construction worker is thereby provided with a strong incentive not to return to work. The Congress, we are sure, did not intend to create a counterproductive compensation law that encourages malingering.

A further incentive to remain on Longshoremen's Act compensation is provided by the annual cost-of-living adjustment tied to the increase in the average

national wage.

In addition, the uncertainty as to the future rates of inflation and the 15 or 25 year payout found in many cases, makes the setting of reserves to cover potential losses a guess at best and an unnecessary risk for any businessman. The nature of the construction business is such that it cannot stand the burden of a vague and ill defined law with such disparity between its compensation levels and those provided by the various state compensation laws.

Availability of Coverage

Not only does confusion reign in determining whether or not a construction contractor has exposure created by the Act, but the contractor has great difficulty in obtaining coverage for the obligations created by Longshoremen's Act.

The reason given to us by the commercial insurers for not insuring

possible Longshoremen's Act exposures in construction is that the Act provides open-ended benefits which, we are told, make it virtually impossible for underwriters to determine future costs and, therefore, determine the proper price for coverage. In essence, that which is fixed, is unratable and hence unavailable to construction contractors.

This unavailability of insurance for possible Longshoremen's Act exposures, which was at crisis proprtions only two years ago and could occur again, has not been limited to any geographic area but is spread throughout the United States. Contractors are faced with the dilemma of broadened Longshoremen's Act exposure, mandated by liberal Department of Labor administrative law judges' and benefit review boards, and fewer insurance markets to approach to insure the expanded exposures.

In order to remedy the situations of unavailability of coverage, greatly over-expanded purview of the Longshoremen's Act, and the confusion, liability and increased costs it creates, we respectfully recommend that this Subcommittee take action to prevent any further misapplication of the Act by effectively removing construction from the definition of employers under the law.

To accomplish this risk, AGC strongly supports S. 1182 and urge that prompt action be taken on this bill.